Supreme Court, U.S.
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No. 90-63

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

FLORAMERICA, S.A., CULTIVOS DE CARIBE, LTDA., AND JARDINES DE COLOMBIA, LTDA.,
Petitioners

v.

UNITED STATES,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Federal Circuit erred in failing to remand prejudicial judicially-recognized error to an administrative agency for correction in disregard of the doctrine of primary jurisdiction enunciated by this Court and recognized by the several Circuit Courts of Appeals.

2. Whether the Court of Appeals for the Federal Circuit erred in refusing to remand prejudicial judicially-recognized error to an administrative agency for correction on the basis that a single document of record constituted substantial evidence in support of the agency determination, when the record as a whole refuted that determination.

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No. ———

FLORAMERICA, S.A., CULTIVOS DE CARIBE, LTDA., AND JARDINES DE COLOMBIA, LTDA.,
Petitioners

v.

UNITED STATES,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Floramerica, S.A., Cultivos de Caribe, Ltda., and Jardines de Colombia, Ltda.[1] (hereinafter "petitioners" or "Floramerica") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit, entered on April 11, 1990, affirming a decision and judgment of the United States Court of International Trade

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[1] The three companies are interrelated through common ownership. All three companies, as well as other related companies in Panama, Holland and Florida, are privately held and owned by members of a single family.

granting partial summary judgment in favor of the respondent United States.[2]

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit (App. 1a-10a) is reported at 901 F.2d 1089 (Fed. Cir. 1990). The opinions of the U.S. Court of International Trade (App. 11a-53a), from which the petitioners took their original appeal, are reported at 717 F.Supp. 834 (Ct. Int'l Trade 1989) and 704 F.Supp. 1114 (Ct. Int'l Trade 1989). The determination of the International Trade Administration, U.S. Department of Commerce, in the underlying administrative action, is reported at 52 Fed. Reg. 6842. (App. 54a-97a).

JURISDICTION

The opinion of the Federal Circuit was issued on April 11, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Federal Circuit's jurisdiction was predicated upon 28 U.S.C. § 1295(a)(5), while that of the United States Court of International Trade was based on 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a.

STATUTORY PROVISIONS INVOLVED

1. Section 1677b of Title 19 of the United States Code, 19 U.S.C. § 1677b, which sets forth the authority of the International Trade Administration of the Department of Commerce to make circumstance of sale adjustments in making price comparisons under the antidumping law, 19 U.S.C. §§ 1673-1677k, is reproduced at App. 98a-101a.

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[2] In addition to the United States, the Floral Trade Council of Davis, California and Asociacion Colombiana de Exportadores de Flores ("Asocolflores") participated in the proceedings before the U.S. Court of International Trade and the Court of Appeals for the Federal Circuit.

2. Section 1516a of Title 19 of the United States Code, 19 U.S.C. § 1516a, which sets forth the procedures, authority and standards for judicial review of International Trade Administration action under the Tariff Act of 1930, as amended, is reproduced in pertinent part at App. 102a-103a.

REGULATORY PROVISIONS INVOLVED

1. 19 C.F.R. § 353.15(c) (1989) (superseded text), which provides that in making comparisons using exporter's sales price, reasonable allowance will be made for all actual selling expenses incurred in the home market up to the amount of the selling expenses incurred in the United States market ("the ESP offset"), is reproduced at App. 104a-105a

2. 19 C.F.R. § 353.13 (1989) (superseded text), which provides that the person alleging entitlement to any adjustment pursuant, *inter alia*, to 19 C.F.R. § 353.15, must establish entitlement thereto to the satisfaction of the Secretary, is reproduced at App. 104a.

STATEMENT OF THE CASE

The petitioners are related growers and exporters in Colombia of fresh cut flowers that became the subject of an antidumping duty investigation by the International Trade Administration ("ITA"), U.S. Department of Commerce ("Commerce"), in 1986. That investigation culminated in a finding in March 1987 that the petitioners had sold certain cut flowers in the United States at prices that were lower than were charged for identical merchandise sold to third country markets. This ITA determination resulted in the imposition of additional duties on flowers shipped by the petitioners to the United States.

The ITA's decision was appealed by Floramerica on the basis that certain adjustments to price that are permitted by law and regulations to ensure fair price com-

parisons had not been fully recognized by the agency. The U.S. Court of International Trade granted summary judgment for the respondent United States on this issue. On April 11, 1990, the U.S. Court of Appeals for the Federal Circuit affirmed the decision of the Court of International Trade.

I. BACKGROUND

The U.S. antidumping law, codified at 19 U.S.C. §§ 1673-1677k, provides for the imposition of antidumping duties when imported merchandise, which is causing material injury, is sold in the United States at a price that is less than "fair value". Commerce has been given the responsibility for administering the law and for determining "fair value" within the context of individual product investigations. In this connection, Commerce is directed by the statute to compare the price at which the merchandise is sold in the United States (so-called "United States price") with the price at which such or similar merchandise is sold in the foreign exporter's domestic market ("foreign market value"). 19 U.S.C. §§ 1673a and 1677b. In the absence of sales of the merchandise in the exporter's home market, Commerce is empowered to consider sales to third country markets or constructed value. 19 U.S.C. § 1677b.

In making comparisons between United States price and foreign market value, the law and Commerce's regulations require that certain adjustments be made. 19 U.S.C. § 1677b(a)(4); 19 C.F.R. § 353.15(c) (1989) (superseded text). The purpose of these adjustments, as they relate to cut flowers, is to establish a net farm-gate price in the markets under consideration so that an apples-to-apples comparison can be made. Thus, for example, both the United States price and foreign market value provisions instruct that adjustments to price be made, *inter alia*, for packing costs and all other costs, charges and expenses incident to placing the merchandise in condition packed ready for shipment. 19 U.S.C. §§ 1677a, 1677b.

II. PROCEEDINGS BEFORE THE U.S. COMMERCE DEPARTMENT

In response to a petition from the Floral Trade Council (representing U.S. growers), Commerce initiated an antidumping investigation of fresh cut flowers from Colombia on June 10, 1986. Commerce presented questionnaires to 12 Colombian companies, including the petitioners, to elicit information, such as U.S. prices, third country prices and production costs, necessary to its statutory determinations.

The petitioners submitted voluminous information to the Commerce Department, including price adjustment data, during the investigation. This information was verified by the agency on-site in Panama, Colombia and the United States. The petitioners accordingly requested that specific price adjustments be allowed by the agency in making the required price comparisons. In its determination, Commerce specifically declared that the requested adjustments were appropriate and would be granted (App. 91a). However, when the agency disclosed its specific calculations to the petitioners, it was discovered that the entire amount of the requested adjustments had not been made. This error resulted in a finding that the petitioners were pricing their product in the United States at less than fair value.

As a result of this determination, the U.S. Customs Service was directed to impose antidumping duties on imports of the petitioners' cut flowers.

III. PROCEEDINGS BEFORE THE U.S. COURT OF INTERNATIONAL TRADE

During April 1987, both the Floral Trade Council and Asocolflores (the trade association of the Colombian growers, including the petitioners) filed separate actions challenging different aspects of the Commerce antidumping determination. Count IX of the complaint filed by the petitioners and Asocolflores contained Floramerica's

argument that the ITA had failed to make allowance for the full amount of certain price adjustments that, had they been fully recognized, would have resulted in a finding that the sales to the United States were made in conformity with U.S. law.

The U.S. Court of International Trade in its January 1989 opinion in the consolidated actions found that certain elements of the Commerce determination were not in accordance with law or not adequately explained in the agency's decision. These matters were remanded to the agency for further consideration and, if appropriate, correction.

In connection with the price adjustment issue affecting the petitioners, the Court of International Trade found that the agency erred in failing to allow the full amount of the relevant price adjustment, but refused to remand the issue for further agency review based on a finding that the petitioners contributed to the agency's error by submitting certain data late in the investigation and in an ambiguous manner (App. 42a-47a).

In a separate opinion issued regarding the ITA's decision on remand, the Court of International Trade again addressed petitioners' allegations but again declined to remand the question. (App. 24a-26a). The Court stated that whereas it possessed the equitable power to order a remand to correct an evident error, to do so would be unfair to other parties in the same action who had been denied other relief in companion cases arising out of other antidumping investigations. (App. 26a)

IV. PROCEEDINGS BEFORE THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Floramerica filed a notice of appeal on September 12, 1989, requesting that the judgment of the Court of International Trade, sustaining the decision of the Department of Commerce regarding Floramerica, be reversed. Floramerica predicated its appeal on the Department's

erroneous calculation of foreign market value and the lower court's recognition of, but failure to remand, that error.

The lower court had asserted error categorically. "The next step is where ITA erred." (App. 45a). "ITA could have been more diligent . . ." (App. 46a). "The court realizes it is perpetuating an error . . ." (App. 47a).

On April 11, 1990, the Court of Appeals affirmed the decision of the Court of International Trade. In its opinion, the Court of Appeals noted that the lower court had found that Commerce had "erred in not deducting the indirect selling expenses of Crown [Floramerica's sales agent] from the foreign market value." (App. 3a) Nonetheless, like the Court of International Trade, the Court of Appeals declined to remand the issue to Commerce for correction, instead finding that there was substantial evidence to support the agency finding on the basis that the agency was entitled to rely on a document filed late in the investigation to the exclusion of other evidence of record and without reference to the record as a whole (App. 8a).

REASONS FOR GRANTING THE WRIT

I. THE FEDERAL CIRCUIT'S OPINION IS IN CONFLICT WITH HOLDINGS OF THIS COURT ON THE QUESTION OF PRIMARY JURISDICTION AS CONSTRUED AND APPLIED BY THE CIRCUIT COURTS OF APPEALS.

The Federal Circuit's opinion disregards the doctrine of primary jurisdiction recognized by this Court early in the development of administrative agencies and, therefore, should be reviewed. *See Texas & Pac. R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). The purpose of the doctrine, well articulated in *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 767-768 (1947), required that the Federal Circuit remand this

case to the Commerce Department for further deliberations:

> Where Congress has clearly commanded that administrative judgment be taken initially or exclusively, the courts have no lawful function to anticipate the administrative decision with their own, whether or not when it has been rendered they may intervene either in presumed accordance with Congress' will or because for constitutional reasons, its will to exclude them has been exerted in an invalid manner. To do this not only would contravene the will of Congress as a matter of restricting or defining judicial action. It would nullify the congressional objects in providing the administrative determination. In this case these include securing uniformity of administrative policy and disposition, expertness of judgment, and finality in determination . . .

Far Eastern Conference v. United States, 342 U.S. 570 (1952); *Great N. Ry. Co. v. Merchants Elevator Co.*, 259 U.S. 285 (1922).

Decisions both by this Court and the Courts of Appeals in the various circuits have recognized that the doctrine of primary jurisdiction not only requires that an administrative agency be permitted in the first instance to consider certain issues, but also that a reviewing court that determines that an agency's factual finding is in error, inadequately explained, or that the agency has otherwise abused its discretion, must remand the question to the agency for further deliberation. *Camp v. Pitts*, 411 U.S. 138, 143 (1973); *Abramowitz v. EPA*, 832 F.2d 1071, 1078 (9th Cir. 1987); *Sears Sav. Bank v. FSLIC*, 775 F.2d 1028, 1030 (9th Cir. 1985). *See also Marx v. Director, OWCP, U.S. Depart. of Labor*, 870 F.2d 114, 122 (3d Cir. 1989); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 919 (5th Cir. 1983).

The Federal Circuit and the U.S. Court of International Trade erred in failing to remand the question of

the petitioner's price adjustment claims to Commerce despite the Federal Circuit's declaration that:

> . . . had the ITA known at the time of its determination all of the facts that were so clearly described by Floramerica before the Court of International Trade, the ITA would have granted a larger indirect selling expense offset than it did. According to the court [Court of International Trade], the ITA erred in not deducting the indirect selling expenses of Crown [an affiliate of the petitioners] from the foreign market value.

(App. 3a).

By declining to require a remand of this question to the agency after acknowledging that the Court of International Trade had found that a prejudicial error had been committed by Commerce, the Federal Circuit usurped the power and prerogative of the agency and improperly substituted its judgment for that of the agency. In doing so, the Federal Circuit departed from the teachings of this Court and of the other Circuit Courts of Appeals. *Camp v. Pitts*, 411 U.S. 138, 143 (1973); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416-419 (1971); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-169 (1962); *SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943); *Flynn v. Schultz*, 748 F.2d 1186, 1194 (7th Cir. 1984), *cert. denied*, 474 U.S. 830 (1985); *Ritter Transp., Inc. v. ICC*, 684 F.2d 86, 88 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983).

It also disregarded the precedent of the Court of International Trade over which it exercises appellate jurisdiction. *See, e.g., The Timken Co. v. United States*, 7 CIT 319, 320 (CIT 1984). In that case, it appeared that the ITA's method of calculating the dumping margins may not have been in accordance with its normal practice and may have been contrary to applicable law and regulation, circumstances which are present in the in-

stant case. The Court concluded that it was appropriate to remand the case to the agency for further consideration. The Court stated:

> The law is clear that remand is appropriate where an agency has followed an improper method in making a determination or where there has been a defect in the agency's finding. *See, e.g., Ford Motor Co. v. NLRB*, 305 U.S. 364, 374-75 (1939); *Greene County Planning Bd. v. Federal Power Comm'n*, 559 F.2d 1227 (2d Cir. 1977) (en banc), *cert. denied*, 434 U.S. 1086 (1978). Indeed, a failure to reopen in the face of erroneous factual information that would clearly mandate a change in result would itself be arbitrary and capricious. *Greene County, supra*, 559 F.2d at 1232. Thus this Court has on several occasions remanded cases to the administrative agency for the purpose of clarifying or correcting challenged determinations. [Citations omitted].

Id. Accordingly, the Court should grant this petition so that a decision contrary to Supreme Court precedent and in conflict with the decisions of each of the referenced Circuit Courts of Appeals that has considered the issue may be reviewed.

II. THE FEDERAL CIRCUIT'S OPINION DEPARTS FROM THE HOLDINGS OF THIS COURT THAT THE EXISTENCE OF SUBSTANTIAL EVIDENCE MUST BE DETERMINED IN LIGHT OF THE WHOLE RECORD.

The Court of International Trade and the Federal Circuit have defined the "substantial evidence" standard consistently with the decisions of this Court.

> The "substantial evidence" standard used by the Court to evaluate whether the agency's findings are supported by law contemplates "essentially a limited review of the agency determination, insuring that the agency conclusions are reasonably drawn from some evidence, more than a mere scintilla, *in light of the record as a whole.*" *Alhambra Foundry, et*

> *al. v. United States*, 626 F.Supp. 402, 407 (1985). (Emphasis added.)
>
> This limited standard of review should not imply, however, that the agency's findings are absolute, for to so hold would render this Court's function meaningless. The Court's overview is necessary to modify, from time to time, "ITA's overly sweeping view of the authority it is granted" to administer the antidumping laws of the United States. *Olympic Adhesives, Inc. v. United States*, No. 89-1367 at 14 (Fed. Cir., March 28, 1990).

American NTN Bearing Mfg. Corp. v. United States, No. 89-06-00338 (Ct. Int'l Trade, May 22, 1990). Notwithstanding its succinct definition of the applicable standard of review and despite noting that it was "perpetuating the error" of the ITA (App. 47a), the Court of International Trade based its decision to refuse remand in the instant case on allegedly ambiguous statements in a single document and not on a review of the evidence in "light of the record as a whole".

The Federal Circuit's opinion similarly endorsed Commerce's reliance on a single document in the record in finding that there was substantial evidence to support the agency's admittedly erroneous determination. In doing so, the Federal Circuit departed from the well established principle that review of an agency decision must be based on the record as a whole. *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490, 522-523 (1981); *NLRB v. Baptist Hospital*, 442 U.S. 773, 782 (1979); *Mowery v. Heckler*, 771 F.2d 966 (6th Cir. 1985); *Hephner v. Mathews*, 574 F.2d 359, 362 (6th Cir. 1978).

In its opinion, the Federal Circuit explicitly countenances Commerce's dependence on a February 5, 1987 submission by petitioners during the then ongoing antidumping investigation to the exclusion of all other evidence in the record:

> The ITA could reasonably have assumed that the charts submitted with the narrative showed the total third country indirect selling expense that the appellants were claiming. With this evidence of the claimed offset, the ITA need not have recalculated the foreign indirect selling expense figures *by referring to the previous submissions of the appellants.* (Emphasis added.)

(App. 8a). When the record before the agency contained other data that the Court of International Trade found would have led to a Commerce decision favorable to the petitioners had it been considered by the agency (App. 43a), the Federal Circuit, instead of adopting that finding by repetition (App. 3a), should have sent the issue back to the agency and should not have condoned an administrative decision made in derogation of substantial portions of the record. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951); *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984); *Childcraft Education Corp. v. United States*, 742 F.2d 1413 (Fed. Cir. 1984); *SSIH Equipment, S.A. v. U.S. Intern. Trade Comm'n*, 718 F.2d 365, 382 (Fed. Cir. 1983); *Beavers v. Secretary of HEW*, 577 F.2d 383 (6th Cir. 1978); *Montgomery Ward & Co. v. United States*, 499 F.2d 1283 (C.C.P.A. 1974).

As evidenced by the foregoing, the Federal Circuit's opinion thus "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 10.1(a). *Universal Camera Corp. v. NLRB*, *supra*, at 491. *See Mobil Oil Corp. v. FPC*, 417 U.S. 283, 292, 310 (1974); *FTC v. Standard Oil Co.*, 355 U.S. 396, 400-401 (1958).

PRAYER FOR RELIEF

WHEREFORE, this Court should grant the petition to review the judgment of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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No. 90-719

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APPENDIX G

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 89-1742

ASOCIACION COLOMBIANA DE EXPORTADORES DE FLORES,
Plaintiff,

FLORAMERICA, S.A. CULTIVOS DE CARIBE, S.A.,
AND JARDINES DE COLOMBIA, S.A.,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee,

FLORAL TRADE COUNCIL OF DAVIS, CALIFORNIA,
Defendant-Appellee.

(Decided April 11, 1990)

James M. Lyons, Heron, Burchette, Ruckert & Rothwell, of Washington, D.C., argued for plaintiffs-appellants. With him on the brief were *Thomas A. Rothwell, Jr.* and *Melanie Morris.*

Jeanne E. Davidson, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for defendant-appellee, The United States. With her on the brief were *Stuart M. Gerson*, Assistant Attorney General

and *David M. Cohen*, Director. Also on the brief were *Wendell L. Willkie, II*, General Counsel, *Stephen J. Powell*, Chief Counsel for Import Administration and *Ann White*, Attorney-Advisor, Office of the Chief Counsel for Import Administration, Department of Commerce, of counsel. *Jimmie V. Reyna*, Stewart & Stewart, of Washington, D.C., argued for defendant-appellee, Floral Trade Council of Davis, California. With him on the brief was *Terence P. Stewart*.

Appealed from: U.S. Court of International Trade.

Judge RESTANI.

Before MARKEY, *Chief Judge*, BENNETT, *Senior Circuit Judge*, and PLAGER, *Circuit Judge*.

BENNETT, *Senior Circuit Judge*.

This appeal is from the final judgment of the United States Court of International Trade denying appellants' motion for summary judgment on the agency record and sustaining the final determination of the International Trade Administration (ITA). *Asociacion Colombiana de Exportadores de Flores* v. *United States*, 704 F. Supp. 1114 (Ct. Int'l Trade 1989). We affirm.

BACKGROUND

This case arises out of the antidumping investigation commenced by the ITA in response to a petition by the appellee Floral Trade Council of Davis, California. The products covered by the investigation were fresh cut flowers produced by certain Colombian flower growers, including the appellants, Floramerica, S.A., Cultivos de Caribe, S.A., and Jardines de Colombia, S.A. (collectively "Floramerica" or "appellants"). Following the investigation and a hearing in which the appellants participated, the ITA issued its final affirmative determination of sales at less than fair value. *Certain Fresh Cut*

Flowers from Colombia, 52 Fed. Reg. 6842 (Mar. 5, 1987), *amended*, 52 Fed. Reg. 8492 (Mar. 18, 1987).

The appellants commenced an action in the Court of International Trade contesting the less than fair value determination of the ITA. The appellants contended that the ITA had not deducted certain indirect selling expenses of a related company, Crown, when it calculated the foreign market value of the flowers. The appellants contended that the identical amount had been deducted from the U.S. price, and the resulting differential between the U.S. price, and the foreign market value caused the ITA to find that sales had been made in the United States at less than fair value.

The Court of International Trade stated that it appeared clear that, had the ITA known at the time of its determination all of the facts that were so clearly described by Floramerica before the Court of International Trade, the ITA would have granted a larger indirect selling expense offset than it did. According to the court, the ITA erred in not deducting the indirect selling expenses of Crown from the foreign market value. Nevertheless, the court held that the deciding factor in placing responsibility for the error was Floramerica's last minute submission of information to the ITA, which did not clearly indicate whether the Crown expenses were included in the foreign sales figures. The Court of International Trade observed that there was "no room for lack of clarity" by Floramerica, the only party in a position to explain its own data. The Court of International Trade found that the ITA did not abuse its discretion in refusing to recalculate the sales margins when the error made by the ITA was attributable to Floramerica's late submission of ambiguous data. Floramerica has now appealed.

OPINION

A. *The Statutory and Regulatory Background:*

The antidumping laws, 19 U.S.C. §§ 1673-1677k (1988), are directed to foreign products that are sold in the United States at less than fair value. *See generally Smith-Corona Group* v. *United States*, 713 F.2d 1568 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984). To determine whether sales are at less than fair value, the ITA compares the price of the goods in the United States with their foreign market value. The foreign market value may be based on sales in the home market of the party under investigation, sales in third countries, or on a constructed value of the imported product.

The United States price is determined by either the purchase price or the exporter's sales price (ESP). 19 U.S.C. § 1677a(a). The ESP is the price at which the goods are purchased by the first unrelated buyer following importation. If the ESP is used, the statute requires a reduction in the U.S. price by the amount of indirect selling expenses incurred by or on account of the exporter in the United States. 19 U.S.C. § 1677a(e)(2). Such indirect selling expenses may include salespersons' salaries, warehousing, and personnel assistance.

The statute does not provide for a similar reduction in the foreign market value, so the statutory reduction in ESP will result in an apparent increase in the dumping margin. To overcome this apparent distortion, the Commerce Department, by regulation, has provided for an adjustment to the foreign market value when the U.S. price is reduced by indirect selling expenses. The regulation in effect at the time of the ITA's final determination provided:

> In making comparisons using exporter's sales price, reasonable allowance will be made for all actual selling expenses incurred in the home market up to the

amount of the selling expenses incurred in the United States market.

19 C.F.R. § 353.15(c) (1989) (superseded text). This allowance is known as the "ESP offset." The regulations also provided that "[t]he person who alleges entitlement to any adjustment pursuant to §§ 353.14 through 353.19 must establish entitlement thereto to the satisfaction of the Secretary." 19 C.F.R. § 353.13 (1989) (superseded text).

B. *The Appellants' Distribution System:*

Floramerica, S.A., Cultivos de Caribe, S.A., and Jardines de Colombia, S.A. are three related Colombian flower producers. Sunburst Farms Miami is a related company that imports and distributes the flowers in the United States and Canada. Sun Petals sells to grocery stores. Sunburst Farms Holland is a related company that imports and distributes in Europe. Crown, a Panamanian corporation, is an intermediary between the Colombian producers and the Sunburst distributors. Crown is related to the other companies.

C. *The Evidence Before the ITA:*

Soon after the investigation was initiated in June 1986, the ITA issued a detailed questionnaire seeking information relating to Floramerica's costs, prices, and selling expenses. Floramerica responded, and the ITA sent deficiency letters requesting additional information and indicating that it required the data to be in a different form. Floramerica filed responses to the deficiency letters. On January 22, 1987, Floramerica filed a prehearing brief with the ITA in which it requested a deduction for indirect selling expenses. Floramerica filed a supplemental response on February 5, 1987. The ITA's final determination issued shortly thereafter, on March 5, 1987.

The information contained in Floramerica's February 5 submission is critical to this case. The submission con-

sisted of charts setting forth various information concerning Floramerica's flower sales and a narrative describing the charts. The charts showed the number of units sold and the per stem cost and price information. One column was labeled "Indirect Selling Expenses." The charts contained information for both U.S. sales and third country sales.

In the narrative explanation of the charts, Floramerica stated:

> *Indirect Selling Expenses:* In exporter's sales price situations, the statute requires that "expenses generally incurred by or for the account of the exporter in the United States" be deducted from U.S. price. * * * Accordingly the selling expense adjustment has been limited to the costs incurred by Sunburst Farms and Sun Petals in making sales in the United States. These costs are reflected in revised attachment 17 submitted on December 31, 1986. A comparable figurge has been calculated with respect to indirect selling expenses incurred by the Floramerica Group, including Sunburst Holland, in selling to Germany. Indirect selling expenses incurred by Sunburst Farms in selling to Canada are the same as the costs incurred in connection with U.S. sales.

When the ITA received this submission, it determined that the charts did not include the indirect selling expenses incurred by Crown with respect to the sales made in the United States. Therefore, pursuant to the antidumping statute, it deducted that amount from the U.S. price. The ITA did not deduct the Crown expenses from the third country price. According to the Court of International Trade, the ITA apparently interpreted the reference to the "indirect selling expenses incurred by the Floramerica Group" as including the expenses incurred by Crown.

Floramerica argues on appeal that it requested the indirect selling expenses offset, and the information it sub-

mitted in response to the questionnaires was sufficient for the ITA to determine the amount of the offset. Therefore, according to the appellants, no substantial evidence supports the ITA's calculation of the foreign market value and its determination of less than fair value sales. The appellants argue that the February 5 submission clearly showed that the Crown expenses were excluded from both the U.S. and third country information. According to Floramerica, the ITA's erroneous interpretation of the February 5 submission was due to its failure to consider the other evidence submitted by Floramerica, from which the amount of the ESP offset could be derived.

The government and the Floral Trade Council argue that the appellants had submitted inadequate information initially and had failed to cure the deficiencies. They argue that the February 5, submission was incomplete and ambiguous in that the narrative did not make it clear that Crown expenses were not included in the third country sales figures. They also argue that nothing on the sales charts indicated that only part of the indirect selling expenses was included or that the Crown expenses were excluded.

We hold that the ITA's determination is supported by substantial evidence, namely Floramerica's February 5 submission which described the ESP offset it was claiming. The Court of International Trade did not err in concluding that the ITA had not abused its discretion in not recalculating the sales margins.

The February 5 submission makes it clear that the Crown expenses were not included in the U.S. selling expense adjustment. The narrative stated that the U.S. expense adjustment was "limited to the costs incurred by Sunburst Farms and Sun Petals. * * *" Therefore, the ITA properly recalculated the U.S. indirect selling expenses to include Crown, as required by statute.

With respect to the third country sales, however, the February 5 submission is not clear. The narrative stated that "[a] comparable figure has been calculated with respect to indirect selling expenses incurred by the Floramerica Group, including Sunburst Holland. * * *" The ITA could reasonably interpret the reference to "the Floramerica Group" as including Crown and therefore could interpret the February 5 submission as including the Crown expenses for third country sales. The ITA could reasonably have assumed that the charts submitted with the narrative showed the total third country indirect selling expenses that the appellants were claiming. With this evidence of the claimed offset, the ITA need not have recalculated the foreign indirect selling expense figures by referring to the previous submissions of the appellants.

That the Floramerica Group can now show on appeal how a different ESP offset could have been calculated does not mean that the ITA's determination was not supported by substantial evidence when it was made. Under the regulations, the appellants had the burden of establishing their entitlement to the ESP offset. The ITA could take the appellants' February 5 submission for what it said and interpret it as setting forth the total ESP offset that Floramerica was claiming. The appellants should not be allowed to reconcile the ambiguities by rearguing their position when they had the opportunity to present their case unambiguously during the investigation.

Conclusion

We conclude that substantial evidence supports the ITA's determination of the ESP offset and the sales margins. The Court of International Trade did not err in holding that the ITA did not abuse its discretion in refusing to recalculate the margins. We therefore affirm.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

89-1742

THE ASOCIACION COLOMBIANA DE EXPORTADORES DE FLORES,

Plaintiff,

FLORAMERICA, S.A., CULTIVOS DE CARIBE, S.A., AND JARDINES DE COLOMBIA, S.A.,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee,

and

FLORAL TRADE COUNCIL OF DAVIS, CALIFORNIA,

Defendant-Appellee.

On Appeal from the United States Court of International Trade
in Case No.(s). 87-04-00622

JUDGMENT

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER
OF THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

Dated Apr. 11, 1990

Cost: Against, Appellant.

Printing $258.96

Total $258.96

ISSUED AS A MANDATE: May 2, 1990

APPENDIX B

Slip Op. 89-92

UNITED STATES COURT
OF INTERNATIONAL TRADE

Consolidated
Court No. 87-04-00622

THE ASOCIACION COLOMBIANA DE EXPORTADORES DE FLORES, *et al.*,
Plaintiffs,

v.

THE UNITED STATES, *et al.*,
Defendants.

and

FLORAL TRADE COUNCIL OF DAVIS, CALIFORNIA,
Defendant-intervenor

[Remanded] Dated: June 29, 1989

Arnold & Porter (Patrick F.J. Macrory, Spencer S. Griffith and *Gwyn F. Murray)* for Asociacion Colombiana de Exportadores de Flores, et. al.

Heron, Burchette, Ruckert & Rothwell (Thomas A. Rothwell, Jr. and *James M. Lyons)* for Floramerica.

Stuart E. Schiffer, Acting Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch *(Jeanne E. Davidson)* Civil Division, United States De-

partment of Justice; *Anne W. White*, Office of the Chief Counsel for Import Administration, United States Department of Commerce for defendant.

Stewart & Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., and *Jimmie V. Reyna)* for Floral Trade Council of Davis, California.

OPINION

BACKGROUND

RESTANI, Judge: Representatives of both the Colombian and the domestic fresh cut flower industry challenge the results of the United States International Trade Administration (ITA) remand determination, wherein ITA amended its previous assessment of dumping rates for some respondents, while leaving other respondents' rates the same. The court's original opinion in this matter ordering remand to ITA is *Asociacion Colombiana de Exportadores de Flores v. United States*, 13 CIT ——, 704 F. Supp. 1114 (1989) hereinafter referred to as *Asocolflores I*. That opinion contains the relevant factual information applicable to this case, and almost all of the relevant legal discussion, and should be read in conjunction with this decision. Asocolflores is a Colombian producer and exporter organization, and the lead plaintiff herein. For ease of argument, plaintiffs generally will be referred to as "Asocolflores," "plaintiffs," or "respondents."[1] Where appropriate the court will refer to individual producers or exporters. Floral Trade Council, also a plaintiff, but not referred to as such in these consolidated actions, represents domestic flower interests and is referred to as "FTC." Defendant is the United States of America.

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[1] One group of producers, Floramerica and its related Colombian companies, filed a separate brief.

A. *Asocolflores' Challenge to the Rate for Non-Responding Companies*

In its original determination, for companies which were included in its sample for investigation but which did not respond properly to ITA's requests for information, ITA utilized the highest rate of dumping then reflected in the record. This rate was the highest rate for any company whose data was successfully verified. The company with the highest such rate was Uniflor, an exporter. Upon remand, because of a change in methodology approved by the court, *see* discussion Section B *infra*, Uniflor's rate dropped forty percentage points to approximately forty-six percent.[2] *See* Remand Determination at 10-11. This remains the highest rate derived from verified data.

On remand, for these non-responding companies ITA decided to use petitioner's rate as the highest rate of record. *Id.* at 11. Pursuant to statute, 19 U.S.C.A. § 1677e (West Supp. 1989), ITA may use "best information available" (BIA) to assign a dumping rate to such companies if they do not provide ITA with the information it requests. The statute also states that information "submitted in support of the petition" *may* be chosen by ITA as best information available for purposes of a final determination. 19 U.S.C.A. § 1677e(b).

Asocolflores objects to ITA's use of petitioner's rate as BIA on the basis that a verified rate should be used because such a rate by its very nature (i.e. that it is derived from information confirmed by ITA) is "better" information than petitioner's rate, which is based only on data provided by petitioners. *See* Plaintiffs' brief at 3-4. Defendant for its part claims that this is a discretionary matter, and that its newly articulated policy is to use the highest rate available for non-cooperative parties,

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[2] This is not an insignificant rate. Some large producers had *de minimis* or very low rates.

which in this case is the rate alleged in the petition. ITA further avers that under this policy, parties which are cooperative but yet cannot substantially comply with ITA's requests, likely would receive rates lower than the petition rate. As this policy is newly articulated there are no court precedents directly on point.[3]

As far as the non-responding parties are concerned they are in a particularly difficult position. Presumably, petitioner's rate was known and any interested respondent could have complied with ITA's request if it had data to establish a lower rate. None of these non-complying respondents or anyone representing them has demonstrated to the court that it should relieve these particular companies of petitioner's rate, if such companies are considered on an individual basis. In fact, it appears that these companies have not participated directly in the administrative or judicial proceedings and are not in a position to object on behalf of themselves. The inquiry, however, does not end here. The rates chosen for these non-complying respondents have application beyond their effects on the non-complying respondents themselves. The BIA rates for non-complying respondents were averaged with other rates from companies comprising ITA's random sample to arrive at an "all other rate." This rate is applied to those companies which were not part of ITA's random sample and which were not asked to participate in ITA's investigation.

In *Asocolflores I*, the court approved inclusion of the BIA rate assigned to non-responding companies (which then was Uniflor's verified rate) in ITA's calculation of an average "all other rate" for those companies that were not part of ITA's sample. At that time the court found ITA did not err in finding Uniflor sufficiently representa-

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[3] This policy is partially reflected in the administrative determinations in this case, but it was elaborated upon during a post-remand telephone conference among the parties and the court.

tive so as to be includable in the sample, and that the integrity of the sample required inclusion of rates for non-responding companies that were within the sample. *See Asocolflores I* at 1121, n.11, and 1126. The court finds, however, that under the facts of this case use of petitioner's unverified rate, as part of the averaged rate, simply because it is the "highest" rate, is unreasonable.

One question to be answered here is whether, in the absence of proof of collusion among the parties, ITA should use an unverified rate in the random sample average if a verified rate is available. The court concludes that, in general, too great a burden would be placed upon the agency if proof of collusion were required before petitioner's rate is used in such a situation. But in a case such as this where, for at least three of the four non-responding companies, there seems to be demonstrable proof that the parties were not colluding, use of petitioner's rate seems to be particularly inappropriate. The record indicates that these companies had their own reasons for non-cooperation which were unrelated to the margin level, and the fact-pattern makes collusion nearly an impossibility in this case. The four companies either had business difficulties or no continuing sales of the relevant merchandise, so they may not have found it worth their while to respond.

In other cases, if it is acceptable for ITA to use petitioner's rate for individual companies and a lack of collusion is not so apparent from the fact pattern, the preferred methodology may be to use petitioner's rate in the "all other" average, because it is the rate actually assigned to those companies. In the present case, however, because the verified rates are so much lower than petitioner's rate and because some or all of the non-responding companies appear to have had no motivation to respond, even if their rates would have been far below petitioner's, blanket use of petitioner's rate to calculate the "all other rate" is not appropriate.

On remand, ITA should look at the reasons of record for non-response. If the record indicates that a company is out of business, that it made a one-time sale, or that it had a similar reason unrelated to deposit rates for not responding, a verified rate should be used for purposes of establishing an "all other rate." [4] In other cases, not now before the court, exigencies might or might not permit the use of petitioner's rate where the all other rate is based on a random sample. When dealing with the partial application of quasi-punitive rates to innocent parties, that is, those not part of the sample, further inquiry and explanation is required by ITA before the final average "all other" rate is determined.[5]

B. *Asocolflores Challenge to Uniflor's Material Cost Estimate*

In its original determination ITA used Uniflor's unverified estimates of increases in material costs for the first half of 1986. Uniflor's data was generally verifiable; thus, it was not assigned a BIA rate. To fill in some missing data, the court directed ITA on remand to use averages of verified data, if they revealed higher 1986 costs than estimated by Uniflor. *Asocolflores I* at 1118. The court found this to be a fair approach, as well as being in keeping with ITA's own statement as to its methodology for those companies which had been fully

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[4] Asocolflores has requested Uniflor's rate, the highest verified rate available. There is nothing in the record of this case to indicate ITA should choose a lower rate at this point in this action.

[5] It is disingenuous of defendant to argue that any producer could have participated without being part of the sample. Small producers cannot participate easily and if many parties had volunteered ITA could not have investigated them. The purpose of the sample was to avoid an unwieldy investigation. In addition, parties not volunteering are not guilty of something which requires punitive action. Parties not part of the sample have a right to expect that ITA's sampling techniques will yield a fair rate related to actual industry behavior, not a rate unduly related to petitioner's claims.

verified, except for minimal items. Plaintiffs now allege that it is unfair of ITA to continue to use the estimate, just because the average of verified cost increases is lower than Uniflor's estimate. The court concludes that this objection is too late. If parties with an interest in Uniflor's rate wished to abandon Uniflor's own estimate of its costs, they should have so advised the court prior to remand. Furthermore, if they had no confidence in the estimate, prior to final determination they should have asked the agency to use an average rate.

C. *Floramerica's and FTC's Challenges as to Correction of ITA Clerical Errors*

In *Asocolflores I*, the court instructed ITA to correct certain clerical errors noted by the parties regarding Floramerica's dumping margins. *See Asocolflores I* at 1126. Those clerical errors were allegedly: 1) that ITA incorrectly calculated the foreign market value for standard carnations for the months of January 1986 and November 1985, and 2) that the U.S. price for June 1985 had been computed erroneously. The parties are in agreement regarding the error as to computation of U.S. price. Accordingly, ITA's correction of this figure is accepted. With regard to the foreign market value error, Floramerica claims that ITA has now corrected the error for January 1986, but that an error still exists in the November 1985 calculation figure. Plaintiff Floramerica's brief at 3. FTC, for its part, claims that ITA has again miscalculated both the November 1985 and January 1986 values. *See* FTC's Response to Plaintiff's Comments at 3-4. FTC claims that this mistake arose because ITA took figures from frames 1853 and 1854 (Reel 3 of the Confidential Record) rather than from frames 1889 and 1890. *Id.* at 4.

Defendant claims that the figures noted in frames 1889 and 1890 constitute "preliminary, unrevised figures for the entire fourth quarter, not merely for the month of November 1985." Defendant's Brief at 18-19. Upon re-

view of these documents, it seems clear to the court that the documents alleged by FTC to be correct are in fact only preliminary assessments, as defendant posits. The court therefore affirms ITA's correction of this clerical error. As FTC's allegations regarding the January 1986 figures are based on the same incorrect assumption, that is, that ITA should have used what are now shown to be preliminary figures rather than final calculations, the court also affirms ITA's conclusion as to January 1986.

D. *FTC's Objections to Calculations of Cost of Production*

1. *Timana's Material Costs for 1986*

ITA's method of calculating Timana's material costs for 1986, is affirmed. ITA describes its remand methodology as follows:

> . . . ITA has determined that the most accurate verified material cost figure to use in lieu of the unverified December 1985 - May 1986 material costs is the verified average material cost per bunch sold in the June-November 1985 period (one-half the year-end verified material costs for 1985 divided by bunches sold during June-November 1985). Since the time period June-November 1985 is close to December 1985 - May 1986, the costs can be expected to be close and can be adjusted for cost increases or decreases between these two periods. Moreover, by using the cost per bunch (*i.e.*, per unit), ITA can multiply the June-November 1985 unit cost figure by the units sold in December 1985 - May 1986 to reflect the seasonal differences of higher sales in the first half of the year and to arrive at a material cost for December 1985 - May 1986 using best information available. C.R. Doc. 95 Frame 1650.
>
> Slip Op. 89-3 also orders that any estimates for 1986 material costs based on 1985 verified costs should reflect the average change in costs from 1985 to 1986.

> ITA could only find verified material costs for four producers and the earliest period verified was June-November 1985. The change in material costs from June-November 1985 to December 1985-May 1986 for these four producers resulted in an average *decrease* of 7.8 percent. Thus, Timana's material costs of [ ] Colombian pesos per bunch, verified for June-November 1985 and applied to bunches sold in December 1985-May 1986, would be decreased to [ ] Colombian pesos to reflect the average verified decrease in material costs from the period June-November 1985 to the period December 1985-May 1986.

Remand determination at 6-7.[6]

FTC challenged ITA's determination on this point on several grounds. First, FTC challenges ITA's method of arriving at an average verified increase. FTC's and ITA's disagreement on the amount of the average increase reflects different data pools.[7] ITA apparently averaged in data from one company not acceptable to FTC, that is, Flores Esmeralda. FTC, on the other hand, argues that verified data from Flores Generales should have been included in the average.

The court has concluded that none of the companies whose data was used in calculating the average increase were demonstrated to be so unrepresentative that their data should have been excluded from the calcula-

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[6] ITA may have used a needlessly complicated method. The more straightforward approaches which occur to the court as satisfying the direction of *Asocolflores I*, however, appear to yield results less favorable to FTC, assuming data from the same companies are used to compute an average increase figure. FTC is the only party objecting to any of ITA's methodologies on this point. The original determination challenged by FTC did not yield a result significantly different from the result achieved by ITA's new method.

[7] This issue was clarified in several conferences among the court and the parties. Letter submissions and briefs, which have been made part of the record of this action, further elucidate this matter.

tion of an average increase.[8] FTC has failed to demonstate that Flores Generales should have been included. The portions of the record cited by FTC and defendant do not demonstrate that Flores Generales' material costs were verified to the extent that the difference between 1985 and 1986 costs should have been included in the average of verified data which the court directed ITA to use. It is undisputed that Flores Generales' material cost data includes some amount of overhead costs. This did not prevent ITA from verifying the more inclusive "cost of manufacturing" figure, but ITA did not verify the entire "cost of materials" subset. FTC argues that because only a relatively small overhead figure is shown to be included, *i.e.*, 5% or less, Flores Generales' material cost figure should be considered verified. The court did not direct ITA to use figures which were nearly verified, only those that were verified.[9] In addition, ITA may

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[8] Flores Esmeralda, which had verified data that was included in the average, was hit by a tornado in 1986. This destroyed part of crops of two flower types. FTC, however, has not demonstrated by citation to evidence of record that Flores Esmeralda's decrease in material costs is largely due to an extraordinary weather event. Other parties also had materials costs which declined on an absolute basis. More importantly, FTC has not demonstrated that on a per unit basis, which was the methodology used by ITA to which FTC objected, Flores Esmeralda's material cost change figure was at all unusual.

ITA may have "erred" in excluding La Pampa's data from its average increase calculation. Apparently, from the parties' pre-remand arguments, the court concluded in *Asocolflores I* that La Pampa's material cost data for 1986 was unverified. Defendant now states that they were verified. FTC states that the costs were unverified and has not argued for inclusion of La Pampa's data in the average. In this case, the inclusion or exclusion of the possibly verified data from La Pampa in the average likely had no appreciable effect. For this reason presumably, no request for clarification of the court's statement was made.

[9] Had ITA, during its investigation, needed a verified separate cost of materials figure for Flores Generales, it might have been able to obtain the information to "fill in the gaps." In *Asocolflores I*

have had reason to exclude the separate cost of materials figure as part of the average increase calculation because the increase calculated for Flores Generales was out of line with those derived from more completely verified information. *See* Administrative Record, Doc. No. 96 (reel 3) at frame 1834. Flores Generales started production in 1985, so that its cost allocation methodology may have yielded bizarre results when the data was used to calculate an increase figure. In any case, ITA essentially followed the court's instruction in utilizing fully verified data. ITA also was not required to utilize the highest cost figures available, as FTC argues. *See Asocolflores I* at 1118.

Second, FTC contends that ITA did not follow the court's direction to account for fluctuating costs over the year-long business cycle. The court concludes that ITA has done as much as it must do on this point, utilizing the information available to it, to be fair to each side.[10] If anything, apart from its refusal to use "punitive" data, ITA has leaned toward FTC on this issue. *See supra* note 6.

2. *La Pampa's Material Costs*

As to La Pampa's costs, as indicated *supra*, note 8, if ITA had verified data it should have been used. Defendant has demonstrated, however, that whether averaged data for 1986 increases in costs are used, or whether La Pampa's own data is used, no difference in La Pampa's rate results.[11]

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the court did not require ITA to reopen its investigation to complete verification of separate cost of materails data. Rather, the court directed ITA to use the verified data on hand. The court's direction was based on ITA's original explanation of methodology and FTC's arguments.

[10] The December 1984-May 1985 period was not part of the investigation and, therefore, was not a source of verified costs for comparison purposes.

[11] FTC is not pressing this challenge, and as indicated, it believes La Pampa's data is unverified.

3. *Cull Sales Values as a Deduction to Cost*

Implicit in the court's earlier opinion is its conclusion that there was, at a minimum, conflicting evidence on whether La Pampa "burned" all culls, and that ITA was not required to conclude that all culls were burned by La Pampa. The court directed ITA to use for fully responding companies without verifiable data on this element, the average of verified data on cull sales, as it stated it had in its original investigation. *Asocolflores I* at 1118. ITA complied on remand.

4. *Interest Expenses of Flores Esmeralda*

In its original opinion the court remanded this matter to ITA to explain its policies on offsetting working capital expenses and credits, that is, short term interest expenses and credits. *Ascolflores I* at 1119. In addition, the court asked ITA to explain how it arrived at the conclusion that the interest credits were earned on current operating capital, the proffered rationale for allowing the interest credits as an offset to interest expenses arising from current operations. *Id.*

As to the first point, ITA now has altered its position and there is no challenge to the offset methodology used on remand. The sole question remaining is whether ITA's determination that the current interest expenses were totally offset by interest earned on income from current operations is based on substantial evidence.

ITA explained that it examined Flores Esmeralda's books, thereby verifying that short term interest expenses were totally offset by short term interest earned. Remand Determination at 3. ITA then refers to generally accepted accounting principles (GAAP), which provide both that short term interest is treated as part of working capital, and that working capital is normally restricted to current operating cycles. ITA's assumption, of course, is that Flores Esmeralda records, which look like they reflect GAAP, as well as ordinary business

practices, actually do so.[12] There is the possibility, raised now by FTC, that because of Colombian economic conditions short term investments were made with other than current operating capital. While ITA may have relied too heavily on the facial appearance of the accounting records in the face of FTC's challenge, the record does not appear to contain data on the viability of short term investment of long-term assets which would allow the court to oenclude that ITA erred in not looking beyond the company records. Without contradictory data, the company's records are substantial evidence on which ITA may rely.

The court finds that most of the potential harm to FTC regarding the previous calculation of Flores Esmeralda's interest expense has been eliminated by the change in the offset methodology and that FTC has not met its burden of proving lack of substantial evidence in support of, or failure of ITA adequately to investigate the derivation of interest credits.

E. *FTC's Challenge to Exclusion of Certain of Uniflor's Sales as Unrepresentative*

As should be clear from the court's earlier discussion herein, the court viewed the record as supporting exclusion of the Uniflor sales that were made with full expectation of payment, but on which collection could not be made, as unrepresentative of Uniflor's U.S. sales behavior. On remand, ITA altered its position and arrived at the same conclusion as did the Court. Remand Determination at 10. ITA has further explained on re-

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[12] The court has cited, with approval in various cases, *e.g., Ipsco, Inc. v. United States*, 12 CIT ——, 701 F. Supp. 236, 238, note 3 (1988), ITA's policy of using a "firm's expenses as recorded in its financial statements as long as those statements are prepared in accordance with the home country's generally accepted accounts principles (GAAP) and do not significantly distort the firm's financial position or actual costs." (*Citing Carbon Steel Products from Brazil*, 49 Fed. Reg. 28,298, 28,302 (Jan. 25, 1984).

mand that in a past final determination, in which ITA also was attempting to arrive at an estimated deposit rate in similar circumstances, such sales were excluded. *Id.* at 10-11 (*citing Fabric and Expanded Neoprene Laminate from Taiwan*, 52 Fed. Reg. 37,193, 37,194 (October 5, 1987)). ITA has also explained why it treats such sales differently in annual reviews. *See id.*, (*citing Neoprene Laminate from Japan*, 52 Fed. Reg. 36,295 (September 28, 1987)).[13] The court affirms ITA's exclusion of these sales.

F. *Miscellaneous Issues Not Subject of Remand*

Upon reviewing *Asocolflores I*, the court's earlier determination herein, it appears to the court that the reader may not perceive that Section I.B.4. thereof refers to an adjustment to foreign market value based on constructed value by means of an exporter's sales price offset. *See* 19 C.F.R. § 353.15(c) (1988).

In addition, Asocolflores and Floramerica complain that upon remand the court wrongfully did not instruct ITA to include certain home market selling expenses in its calculation of an exporter's sales price offset for Floramerica. This was not the subject of remand and need not be considered by the court at this time. As this is obviously a very important issue to Floramerica, however, the court has reviewed the matter once more. The court remains convinced that ITA should not be required to recalculate its margins to reflect post-final determination explanations of information, because such explanations were not timely submitted to ITA. It should be noted that there is no dispute as to Floramerica's duty to prove its entitlement to this adjustment. ITA decided and the court affirmed that Floramerica did not meet this burden timely.

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[13] The practice with regard to annual reviews is not before the court.

Among other things, Floramerica seems to argue that because this issue will effect whether Floramerica receives an operative rate or a *de minimis* rate, the court should order ITA to "correct" [14] this selling expense calculation. To rule for Floramerica on such a basis alone the court must be willing to say that parties to proceedings are not required to give ITA timely, clear and accurate information, because if a party's mistake results in an important change in rates, ITA will be compelled to recalculate the rates after final determination.

Congress has required that estimated deposit rates in original proceedings be calculated within very short time periods. One cannot simply throw data at ITA without clear explanations, or provide it with misleading explanations. Accordingly, ITA did not err in declining to recalculate, but rather, apparently made a policy decision in favor of compelling accuracy and timely presentation of data, even if it means here that both ITA and the party involved will be forced to spend time in an administrative review of the rate.

Although the parties did not focus on the extent of the court's equitable powers in these actions, it appears to the court that despite ITA's rational behavior, the court may have discretion, particularly where it is remanding other matters, to order ITA to recalculate in the interest of justice and to save judicial, as well as administrative, resources. The court has declined here to exercise any such discretion it may have. This is a particularly complicated case involving several interrelated investigations, numerous producers and novel methodologies. Due to the size and complexity of the case the court believes justice is better served by keeping remand issues as narrow as is permissible and by restricting all parties to arguments based on the presentation of their cases be-

[14] The court has referred to ITA's "error," only because post-final determination information reveals that an "error" probably occurred.

fore final determination, except on remand issues.[15] If the court orders remand in this situation where ITA did err in its assessment of the data, as presented in the record, and where it did not abuse its discretion in declining to recalculate, other parties, particularly those opposed to Floramerica's position, might rightly ask to raise other issues not timely addressed or to present new evidence or arguments on behalf of a position. One only need read *Asocolflores I* and the previous portions of this opinion for indications that this is not mere speculation. Accordingly, in the interest of fulfilling Congress' desire for expedition, the court adheres to its previous opinion on this issue.

ITA has twenty days to file its remand results on the one issue remaining. *See supra* Section A. This is not an accounting issue, the court expects compliance with this deadline unless extraordinary reasons are presented as to why it cannot be met.

/s/ Jane A. Restani
JANE A. RESTANI
Judge

Dated: New York, New York

This 29th day of June, 1989

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[15] To put this matter in a broader perspective one may wish to review the court's decisions in the related cases in which the court has upheld equally strict standards of accuracy and timely presentation of arguments and data, to the detriment of FTC, a party which opposes Floramerica in this action. *See Floral Trade Council of Davis, Calif. v. United States*, 12 CIT ——, 699 F. Supp. 309 (1988); *Floral Trade Council of Davis, Calif. v. United States*, 12 CIT ——, 704 F. Supp. 233 (1988); *Floral Trade Council of Davis, Calif. v. United States*, 12 CIT ——, 704 F. Supp. 241 (1988); *Floral Trade Council of Davis, Calif. v. United States*, 13 CIT ——, 707 F. Supp. 1343 (1989). While these decisions did not benefit Floramerica directly, it appears to the court that what Floramerica seeks here is application of a different standard than that which the court has applied to all other parties in these related cases.

APPENDIX C

Slip Op. 89-3

UNITED STATES COURT
OF INTERNATIONAL TRADE

Consolidated
Court No. 87-04-00622

Before: RESTANI, Judge

THE ASOCIACION COLOMBIANA DE EXPORTADORES DE FLORES, *et al.*,

Plaintiffs,

v.

THE UNITED STATES, *et al.*,

Defendants.

[Remanded.] Dated: January 6, 1989

Heron, Burchette, Ruckert & Rothwell (Thomas A. Rothwell, Jr., James M. Lyons, Joseph A. Vicario, Jr., and *Alfred G. Schotte)* for Asociacion Colombiana de Exportadores de Flores.

John R. Bolton, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch *(Jeanne E. Davidson)* Civil Division, United States Department of Justice; *Anne W. White*, Office of the Chief Counsel for Import Administration, United States Department of Commerce for the United States.

Stewart & Stewart (Terence P. Stewart and *James R. Cannon, Jr.)* for Floral Trade Council of Davis, California.

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Slip Op. 89-3

UNITED STATES COURT
OF INTERNATIONAL TRADE

Consolidated
Court No. 87-04-00622

THE ASOCIACION COLOMBIANA DE EXPORTADORES DE FLORES, *et al.*,

Plaintiffs,

v.

THE UNITED STATES, *et al.*,

Defendants.

OPINION

RESTANI, Judge: This consolidated case is before the court on cross-motions for summary judgment based on the agency record. Both the foreign producers and the domestic industry challenge the final affirmative antidumping determination of the International Trade Administration (ITA) in *Certain Fresh Cut Flowers from Colombia*, 52 Fed. Reg. 6842 (1987), as amended, 52 Fed. Reg. 8492 (1987).[1] The parties have managed to reduce the issues in this case to approximately two dozen. For the sake of brevity and because the standards of review and definitions of applicable statutory terms are well known, they will not be repeated here.[2] The court

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[1] Because of a multiple domestic industry finding by the International Trade Commission (ITC) during its injury investigation, margins were recalculated.

[2] Citations to the public record are designated "AR." Citations to the confidential record are designated "CR."

will begin by addressing the challenges of the domestic industry party, the Floral Trade Council of Davis, California (FTC or Petitioner).

I. FTC CHALLENGES

A. *United States Price Issues*

1. *Monthly Averaging*

FTC's most far-reaching challenge is to ITA's averaging of United States prices on a monthly basis. The court has approved ITA's adoption of this averaging methodology as to related flower investigations. There are no facts of record here which would alter that conclusion. *See Floral Trade Council of Davis, California v. United States*, 12 CIT ——, Slip Op. 88-170 (December 27, 1988) (containing complete discussion of the court's reasons for approval of monthly averaging in the related cases).

2. *U.S. Price Data for Flores Timana (Timana)*

FTC asserts that ITA did not verify certain information provided by the Colombian producer known as Timana, and therefore, ITA may not rely on data submitted by Timana. *See* 19 U.S.C. § 1677e(a) (1982 & Supp. IV 1986 which (requiring verification of data relied on by the agency and permitting use of "best information available" in the absence of such verifiable data). Specifically, FTC objects to Timana's claim that its sales for export to the United States were at certain prices, while various invoices and export licenses revealed lower U.S. prices. ITA determined, by reference to bank deposit records and accounting information obtained from Timana, that Timana's U.S. prices were as claimed by Timana.

ITA is not required to accept information contained in invoices or export licenses at face value if ITA deter-

mines, based on other evidence of record, that a different price was paid. FTC claims that the chain of evidence demonstrating the higher U.S. prices was not sufficiently linked. The court finds ITA could reasonably come to the opposite conclusion based on the data obtained by ITA, in conjunction with the plausible explanation presented by Timana as to the why the price discrepancy occurred.[3] The court finds, therefore, that Timana's U.S. price response was adequately verified, and that there was no failure of verification requiring use of other information.

3. *U.S. Price Data of Floramerica*

FTC also objects to ITA's lack of vertification of sales for export to the United States made by Caribbean Flowers, a sales arm of the producer Floramerica.[4] Caribbean Flowers sold flowers produced by independent growers. ITA stated that the independent producers knew that the sales made through Caribbean were for export and merely used Caribbean as a freight forwarder. If this were the situation, the producers would have been proper respondents, assuming they had been included in the sample of producers which ITA was investigating, which they were not. *See, infra*, section II B. at 13. ITA did, however, verify Floramerica's reported volume of U.S. sales. FTC's statement that Floramerica could have hidden less than fair value (LTFV) sales by improperly denominating such sales "Caribbean Flower Sales" is mere speculation. Speculation is not support for a finding of failure to verify.

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[3] A more detailed description of the circumstances involved is found in the confidential briefs filed in this matter.

[4] "Floramerica," as used here, refers to both an amalgam of three interrelated Colombian growers, and one of the three growers.

B. *Foreign Market Value Issues*

1. *Cost of Production or Constructed Value at Timana, Flores La Pampa (La Pampa) and Flores de Universal (Uniflor)*

a. *Cull Value at Timana and La Pampa*

ITA calculated foreign market value by using certain producers' or sellers' cost of production as constructed value where there were insufficient above cost home market or third country sales of export quality flowers. *See* 19 U.S.C. § 1677b(a)(2) and (e) (1982 & Supp. IV 1986). Apparently this situation existed with regard to all flowers at Timana and Uniflor. 53 Fed. Reg. at 6844, 6848 (comment 36). An investigation as to whether sales of standard carnations on which foreign market value might be based were below cost of production and thus unusable was conducted as to La Pampa, among others. *See* 19 U.S.C. § 1677b(b) (1982); 52 Fed. Reg. at 6844. La Pampa's sales of standard carnations were found to be above cost of production. *Id.*

Once again, FTC alleges Timana failed verification, and that all of Timana's data must be rejected. The court finds that FTC has not demonstrated that ITA abused its discretion in using Timana's cost data, where it was available. Defects in data which are minimal do not result in failure of verification requiring use of best information available in place of all of the respondent's data. In this particular case the industry, as a general practice, does not maintain data of the type sought by ITA, thus ITA could properly use estimates as to the limited data which was unavailable.

Based on estimates, respondents were allowed a credit against cost of production for the value of substandard merchandise which was sold in the local market. The reason for selection of the particular estimates of the value of sales of substandard or "cull" merchandise for La Pampa and Timana, however, was not clearly ex-

plained, even in supplemental briefing.[5] Both Timana and La Pampa claimed little cull value, yet ITA used estimates for Timana and La Pampa which were quite high in comparison with the rates apparently assigned to some firms. In its determination, ITA asserts that it used an average of verified data if a substantially complying respondent did not provide specific data for a certain category. 52 Fed. Reg. at 6845 (comment 2). As to Timana, rather than using an average of the cull values attributed to other firms, ITA used a favorable rate "in line" with that of a specific company. In its supplemental brief, ITA has not explained why it did not do what is described in the determination. Respondents lacking data should not be preferred over those fully complying with ITA's request, nor should petitioner be penalized for a respondent's lack of data. ITA may have a good reason for selecting another firm's cull value data to be used to fill in Timana's data. If so, that has not yet been explained. Unless such reason is compelling, at this stage ITA should do as it stated it had done and use average values for this information. A similar problem exists with regard to La Pampa.

b. *1986 Material Costs for Timana, La Pampa and Uniflor*

Because Timana had completed only its 1985 inventory at the time of ITA's request, no verifiable 1986 data on material costs was available. ITA allegedly allocated a material cost to the first five months of 1986 based on Timana's verified costs for the corresponding 1985 period. *See* 52 Fed. Reg. at 6848. In post-argument briefs, ITA

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[5] Plaintiff has made a vague allegation regarding Uniflor's cull value offset to cost. The verification report shows that a credit was calculated using, in part, a cash sale journal ledger. The final determination at Respondents' comment 39 indicates sales receipts were also used. 52 Fed. Reg. at 6852. FTC has not demonstrated that any significant error occurred. *See also, infra*, discussion of Asocolflores' challenge to Uniflor's cull value offset.

admitted it mistakenly used data from a non-corresponding period to estimate 1986 costs for Timana. ITA should correct its error in such a way as to account for fluctuating yearly costs and to account for any likely increases revealed by record evidence as to other producers. For example, if 1986 costs were generally reported by other producers to be higher for the 1986 period, an estimated average increase for 1986 could be added. This would be consistent with the statement that averages would be used for missing data. FTC makes similar complaints as to La Pampa. The methodology for La Pampa should be the same as described here for Timana.

Uniflor, a seller of miniature and standard carnations, was assigned a cost of materials figure for 1986 based upon verified 1985 cost data plus Uniflor's own estimate of a percentage increase for 1986. Any unverifiable 1986 increase figure should not be used if it is lower than the average of verifiable 1986 increases over 1985 costs. To do so would be an improper use of best information available.

In general, ITA has to draw a balance when information is not made available by the respondent or is otherwise not verifiable. ITA leaned one way when it decided to accept *some* data from the respondents. As indicated, this was reasonable as ITA justifiably found substantial compliance. In order to achieve a fair balance, however, ITA has to lean back the other way somewhat to avoid improperly favoring respondents as to the missing information. ITA can reach the balance in several ways. In this case, it claimed it would use an average of data from other sources. This would appear to be one acceptable choice for substantially complying respondents. In other cases, ITA may have reason to use data less favorable to respondents. This could be particularly true where ITA is uncertain as to whether a respondent could have provided the missing data. What ITA should not do is assign particularly favorable data to respondents if more neutral data is available.

2. *Capitalization of Propagation Costs*

FTC objects that ITA erred in calculating the cost of production by relying on current expense data regarding propogation costs at Floramerica. According to FTC, such method inadequately accounted for propagation costs incurred in earlier years for the flowers sold in the review period. Floramerica did not capitalize its costs, but ITA in making its calculations assumed that propagation costs were continuous so that utilization of current expense data would approximate the results of capitalization.

Apparently, the major source of disagreement between ITA and FTC involves carnation production,[6] because carnations have a life span of two years. FTC argues that ITA did not know if the current expense data was usable because ITA failed to determine if all plants were replaced every two years or whether half were replaced every year. ITA states that despite the time periods needed for the plants to become useful, production was stable. FTC counters that disease or weather could have caused production not to increase.[7] This is mere speculation. Reasonable business practice would require planting that resulted in stable production on a yearly basis. The record showed that production was stable. The court finds that ITA did take a somewhat broad approach on this issue but its conclusion is sufficiently supported.

3. *Interest Credit at Flores Esmeralda*

FTC objects that ITA improperly allowed Flores Esmeralda a short term interest credit in its cost calcula-

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[6] Foreign market value for sales of standard carnations by Floramerica was calculated based on third country prices, but cost remains relevant because of plaintiff's assertion that substantial sales were at less than cost. This would require, under certain conditions, the use of cost based constructed value for foreign value calculation purposes. *See* 19 U.S.C. § 1677b(b) (1982).

[7] Evidence of record indicates that Floramerica did not have disease problems and also had substantial propagation costs in the years of concern.

tion. FTC argues that ITA did not ascertain whether the interest earned was actually derived from current cash flow. Neither ITA's determination nor defendant's supplemental brief with regard to interest income was sufficient to explain why ITA states that the substantial figure for interest income accepted as a credit was actually based on interest arising from current operations. No citation to evidence of record was made indicating that the interest was earned on a "temporary short term investment related to current company operations." Defendant's Supplemental Brief at 4. Thus, the court cannot determine whether, in this case, the investment income which was netted against interest expense was related to current operations. Defendant also failed to provide as requested a general explanation as to if, or in what circumstances, interest credits and expenses are netted rather than allowing interest income as an offset up to the amount of interest expense. None of the past administrative cases cited by the parties on this point is clear as to past practice. The statements in *Erasable Programmable Read Only Memories (EPROMs) from Japan*, 51 Fed. Reg. 39,680, 39,684 (Oct. 30, 1986), cited by defendant is particularly confusing. The rationale and factual basis for ITA's determination on this issue have yet to be revealed.

4. *Adjustment of Constructed Value for Differences Between Selling Expenses in the Home Market and in the U.S. Market*

In its determination, ITA applied 19 C.F.R. § 353.15 (1988) to reach a fair comparison between U.S. and home market sales by deducting from constructed value specific United States selling expenses. This methodology has been found to be reasonable and necessary under 19 U.S.C. § 1677b(a)(4) (1982 & Supp. 1986). *See The Timken Co. v. United States*, 11 CIT ——, 673 F. Supp. 495, 507-8 (1987). Constructed value is one way of arriving at foreign market value. According to *Timken*,

once basic foreign market value has been calculated by any method, that is, home market sales, third country sales, or constructed value, it should be adjusted for differences between conditions in the home market or in the surrogate market and conditions in the United States, in order to achieve a fair comparison. This court has been presented no convincing reason why *Timken* should not be followed.[8]

The court will next address the challenges of the various foreign producers. The lead plaintiff in these consolidated actions is known as Asocolflores. It is a trade association. Although FTC is also a plaintiff in this consolidated action, the court will refer to the various producers or exporters generally as "plaintiffs" or "Asocolflores."

II. ASOCOFLORES' CHALLENGES

A. *Scope of the Antidumping Laws*

Asocoflores makes a general argument that the fresh-cut flower industry operates in such a manner that any dumping is in essence "technical," and that Congress did not intend for duties to be imposed in such a situation. Asocoflores' arguments lead the court to conclude that four factors are to be considered: the cyclical nature of the industry, the perishability of the merchandise, the lack of a developed home market, and the consignment basis of many of the U.S. sales at issue.

In response to plaintiffs' arguments regarding cyclical value and perishability, the court finds that ITA made ample effort to adjust its computations to account for the yearly cycle and the perishability of the merchandise

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[8] The court does not reach the issue of whether an adjustment which brings the general expense aspect of constructed value below the statutory minimum as set forth in 19 U.S.C. § 1677b(e) is permissible as plaintiff did not demonstrate that this occurred here. *But see Timken,* which appears to approve the full circumstances of sale adjustment. 673 F. Supp. at 508 n.21.

at issue. *See* discussion of averaging in *Floral Trade Council of Davis, California v. United States*, 12 CIT ——, Slip Op. 88-170 (Dec. 27, 1988). ITA's approach was broad enough to eliminate, to a reasonable degree, the potential that an investigation of this industry would result unfairly in an affirmative finding because of "necessary" low priced sales.[9]

In response to Asocolflores' comments regarding the lack of a "genuine home market," the court finds that Congress specifically provided a method for dealing with lack of home market sales in 19 U.S.C. § 1677b(a) (1982 & Supp. IV 1986). Thus, Congress' intent appears to be that the antidumping laws should apply in such circumstances as these.

Lastly, Asocolflores notes the existence of consignment sales, the prices of which are not directly controlled by the producers. The argument is that in view of the other factors and this lack of control, it is clear that the producers do not intend to dump their merchandise. The antidumping laws, however, do not make producers' intent determinative. *See USX v. United States*, 12 CIT – —, 682 F. Supp. 60, 68 (1988). Furthermore, all U.S. sales, whether made pursuant to consignment agreements, fixed priced contracts or otherwise, except for certain inapplicable exceptions, are to be included in margin calculations.[10] This enables the full effect of unfair pricing to be counteracted. Producers are not en-

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[9] The court finds without merit Asocolflores' argument that monthly averaging on a per consignee, as opposed to a per producer or exporter, basis, undermines the rationale for ITA's approach.

[10] Note that the definition of exporter, applicable to exporters' sales price transactions for U.S. price purposes, which is found in 19 U.S.C. § 1677(13) (1982) refers to agents of producers. That this term includes consignment agents is confirmed by the legislative history of the Antidumping Act of 1921. *See* Hearing on H.R. 2435 before the Senate Finance Committee, 67th Cong., 1st Sess. at 42-43 (1921).

titled to an exemption from the antidumping laws merely because they put pricing outside their direct control. Whether the factors discussed here are considered together or separately, plaintiffs are not entitled to an overall negative determination.

B. *Sampling*

Asocolflores alleges that ITA's sampling techniques were defective. During the administrative proceedings, Asocolflores suggested a list of eighteen producers which it believed should be investigated. These producers were responsible for sixty percent of imports. Investigation of the eighteen largest producers would have reflected ITA's traditional method of investigation. *See* 19 C.F.R. § 353.38 (a) (1988). In this case, however, ITA decided that sampling was required because of the large number of transactions involved, but more importantly, because the Colombian industry was composed of numerous small producers. Sampling is specifically authorized by 19 U.S.C. § 1677f-1(a) (Supp. IV 1986). The parties do not dispute that the first statutory requirement was met, that is, that sampling be used only if a significant number of transactions (or adjustment) are involved. *Id.* The second requirement under the statute is that the type of sampling employed yield representative results. *See* § 1677f-1(b). This is the subject of dispute.

In the case of an industry composed of numerous small producers some type of random sampling may be the preferred approach. *Cf. Fabricas El Carman, S.A. v. United States*, 11 CIT ——, 672 F. Supp. 1465, 1479 n.25 (1987) remand order vacated as moot 12 CIT ——, 680 F. Supp. 875 (1988). (Fabricas is distinguishable because it involves country-wide countervailing duty rates; the court, however, expressed concern about ITA's traditional methodology for industries composed of numerous small firms, which methodology the court viewed as a type of non-random sampling. ITA's sample in the case

at hand resulted in the investigation of one large exporter and about eleven smaller ones.[11] This is approximately the ratio of large to small firms in Colombia, overall. Furthermore, each flower type involved in the investigation was covered by the sample.

Asocolflores' main complaints seem to be that too few large exporters were included in the sample and that a stratified sampling technique should have been employed.[12] Plaintiffs requested stratification according to the size of the producer, but some of their arguments imply that stratification by type of flower produced is also sought. Plaintiffs' desire for one or more types of stratified sampling is not a sufficient basis for objection to ITA's methodology. ITA performed an acceptable random sample. A stratified sample is merely a special type of random sample which may be constructed when the investigator has a degree of prior knowledge about the universe to be sampled. J. Freund, *Modern Elementary Statistics* 217 (5th Ed. 1979). There is no requirement that a stratified sample be used, particularly when it would require ITA to conduct a substantial pre-investigation.

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[11] Other producers volunteered for investigation, but were not included in the sample for purposes of calculating an "all other rate." ITA properly refused to add to or subtract from the sample for purposes of constructing an all other rate. ITA properly included in its all other rate best infomation rates for companies selected for the sample who did not respond to questionnaires. Respondents must answer; ITA must be in a position to judge who is properly covered by the investigation. Respondents may not make that choice. In a random sampling situation, to exclude such non-responding companies from the all other rate would undermine the overall methodology. This case is distinguishable from non-random sampling cases on this point.

[12] Plaintiffs' other suggestion of a sampling of *sales*, as opposed to producers, is not feasible. ITA's investigations focus on producers. Sampling of sales in this case would lead to a burdensome number of verifications because the number of producers involved would not be reduced significantly.

Asocolflores also argues that a report by economists which it hired demonstrates that certain producers included in the sample were not representative of the group. Costs are alleged to be abnormally high or other factors are said to make the firms unsuitable for inclusion in the sample. Perhaps if ITA had unlimited time it would have chosen a broader sample or would have kept resampling until its selection satisfied even the most stringent standards. ITA, however, has very limited time in which to conduct its investigations. None of the characteristics attributed to the producers which Asocolflores wishes eliminated seem out of the ordinary for an agricultural industry composed of numerous small producers and some large ones. Furthermore, one small producer with high costs does not seriously skew the sample to plaintiffs' detriment when a weighted margin is used. In such a case, the loan rate attributed to the large producer, or producers, dominates.

In addition, the court finds no disruption to the sample merely because of required recalculations following ITC's determination. In hindsight, it would have been better had ITA stratified per flower type because of ITC's multiple industry finding based on flower type. ITA, however, cannot be held to foresee what ITC's decisions will be. ITC's determinations address different questions and are based on different standards. ITA's sample was not perfectly suited to the final shape of the order, but the sampling methodology was legally adequate and the results of the sampling have not been shown to be unrepresentative.

C. *Foreign Market Value Issues*

1. *Floramerica's Claim to an Exporter's Sales Price Offset*

Floramerica claims that its indirect selling expenses in the home market should offset the deduction to exporter's sales price (ESP) for selling expenses in the United

States.[13] 19 C.F.R. § 353.15(c) (1988) permits such an offset. *See also Smith-Corona Group v. United States*, 713 F.2d 1568 (Fed. Cir. 1983). In order to obtain the offset the claimant must document actual selling expenses in the home market.

As indicated, Floramerica is actually three interrelated Colombia companies—Floramerica, Jardines de Colombia and Cultivas del Caribe. Company X is a related Panamanian company which acts as a distributor for the Colombian Floramerica companies. Other related sales entities are Sunburst Farms, Inc. of Miami, Florida and Sun Petals, both of which market flowers in North America, and Sunburst Holland, which markets flowers in Germany. Sales to Sunburst Miami are made through Company X which purchases the Colombian flowers on a fixed price basis. Sunburst Holland makes sales and then places orders with the Floramerican Colombian companies which then distributes them through Company X to Sunburst Holland.

Asocolflores' complaint is that ITA allowed an offset for selling expenses incurred by the two Sunburst companies but neglected the offset for Company X's expenses which had been included in the reduction to ESP. It appears clear from the submissions that had ITA known, at the time it made its determination, all of the facts that are now so clearly described, that it would have granted a larger offset than it did.

To the court, the question is whether ITA acted reasonably in relying on certain statements of the respondent when it made its foreign market value calculation excluding X's expenses. If ITA acted reasonably, the court will not force a recalculation. To do so under such conditions

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[13] *See* 19 U.S.C. § 1677(a) and (c) (1982) for definition of United States Price and Exporter's Sales Price. *See also* 19 U.S.C. § 1677(13) (1982) (defining the term "exporter" for the purpose of determining United States value).

would undermine the finality of these determinations. As much as the court would like determinations to reflect reality, those determinations should not be judged on the basis of later acquired information about reality. This would be akin to deciding a case on matters outside the record.

A review of the history of the investigation vis-a-vis Floramerica is necessary to an understanding of this matter. Floramerica's first questionnaire response on September 10, 1986 contained very little useful information from which to calculate an ESP offset. *See* AR 65 and CR 19. Totals for selling expenses are included but descriptive information is not. Deficiencies in questionnaire responses are not unexpected. ITA normally sends a deficiency letter in such situations in order to clarify its request. It did so here. *See* AR 79. Following Floramerica's October 10, 1988 submission (CR 23), on October 24, 1986, ITA again sent a deficiency letter specifically noting that indirect selling expense data was missing. AR 109. On October 28, 1986, a supplemental response was submitted which merely references the numerical data in the September response. On October 31, 1986, ITA sent another letter indicating that cost data per sales unit was not supplied. Verification occurred during November and December, 1986, at which time further submissions were requested of Floramerica. On December 31, 1986, Floramerica amended its September 10, 1986 submission and provided cost figures for both the Sunburst companies and Company X. C.R. 102. Although the data sheets do not describe the components of indirect selling expenses for the various U.S. and third country sales directly, the implication of the cost sheets is that two-tier distribution expenses are involved in all relevant sales.

The third questionnaire response of Floramerica was submitted on February 5, 1987. CR 88. This was the first time that Floramerica submitted a specific textual

explanation of its indirect selling expense data along with specific figures.[14] The textual explanation of the numbers, however, seemed more clear than it actually was. As to the U.S. side of the equation, Floramerica's explanation of the figures was that the "selling expense adjustment has been limited to the costs *incurred by Sunburst Farms and Sun Petals* in making sales in the United States" (emphasis added) CR 88 at 4. Floramerica also referred ITA to Attachment 17 of its December 31, 1986 submission. (This was a correction to the earlier Attachment 17 to the September 10, 1986 submission (CR 19).) The statement continues:

> A comparable figure has been calculated with respect to indirect selling expenses incurred by the Floramerica Group, including Sunburst Holland, in selling to Germany. Indirect selling expenses incurred by Sunburst Farms in selling to Canada are the same as the costs incurred in connection with U.S. sales.

CR 88 at 4.

ITA took the specific statement with regard to the expenses listed in Attachment 17 as to U.S. sales literally. It assumed correctly that the Panamanian distributor's expenses were missing and added them to the ESP deduction. The next step is where ITA erred. It passed over the statements that the third country expense data was "comparable" or "the same," and did not add the Panamanian distribution costs to the offset to the ESP deduction. The examiner focused instead on the statements indicating that the U.S. sales figures included only expenses *incurred by* the U.S. entities, and that the third country sales figures included all the selling expenses of the *Floramerica Group*, including the European distributor. This last phrase implies that the concept "Flor-

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[14] The similar textual explanation at page 96 of Asocolflores' pre-hearing brief is unconnected to specific figures.

america Group" included all of Floramerica's distributors. Furthermore, one cannot merely compare the U.S. and Canadian data in CR 88 and see that the indirect selling expenses are the same as to both the U.S. and Canadian sales, that is, that certain expenses are missing from both, because German sales are aggregated with the Canadian sales. Floramerica apparently was requested to present its information in that manner.

Given that ITA had the information readily available (it used it to make deductions on the U.S. price side), and that to the extent it focused on the issue, ITA probably intended to grant the full offset, this matter comes down to placing responsibility for what is a simple error.

On one hand, ITA could have been more diligent in recognizing the inconsistency between the February 5, 1987 statements of data comparability and its own conclusion that Panamanian expenses were missing on only one side of the comparison. On the other hand, Floramerica could have avoided the confusion by clearly indicating Panamanian expenses were not included. In this regard, the parties were equal in their lack of attentiveness.[15]

The deciding factor here is that this was a last minute submission—Floramerica's last chance to explain itself after failing on numerous occasions to present its numercial data properly and to relate it to a coherent textual explanation. ITA could not be expected on Feb-

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[15] This case is distinguishable from *Far East Machinery Co., Inc. v. United States*, 12 CIT ——, 688 F. Supp. 610 (1988) in which the court ordered a remand to enable ITA to consider documentation which was submitted late in a proceeding. Unlike the *Far East* case, in this case ITA's requests were not misleading and there were no shifts by ITA in defining the standards applicable to the issue. Furthermore, in *Far East* at least one party spelled out clearly exactly what the numbers of concern indicated. That did not happen here.

ruary 5, 1987, to make the same inquiries it would have made on September 10, 1986, or during verification. This information was provided post-verification. At that point there is no room for lack of clarity by the only party apparently in a position to explain its own data, Floramerica.

The court realizes it is perpetuating an "error," but if these investigations are to be successful, parties must submit data promptly, and be very clear as to what the data indicates. The court also notes the numerous other errors and discrepancies which led petitioner to allege failure of verification by Floramerica. Just as the court found ITA did not abuse its discretion in finding a successful verification, the court finds ITA did not abuse its discretion in refusing to recalculate the margin when the error made by ITA is attributable to plaintiffs' late submission of ambiguous information.

2. *Use of Third Country Prices in General*

Asocolflores alleges that third country prices are unfairly used as surrogates for home market prices, in place of constructed value, for two reasons. One, it alleges that the third country product mix is composed of higher quality flowers than are sold in the United States. Two, it alleges that European sales are made on a fixed priced basis, while U.S. sales are made on a consignment basis.

These statements are either overbroad or unsubstantiated. No citation to the record regarding the quality of the flowers sold in Europe or Canada is given. Some U.S. sales are made on a fixed price basis. No claim is made that all Canadian sales are made on a fixed price basis. Asocolflores ignores the fact that the act is designed to compensate for dumping, however it materializes, and the fact that ITA made ample adjustment for selling conditions in the United States versus those in third countries. If properly adjusted, third party sales may be utilized by ITA to make a fair comparison.

3. *Use of Both Constructed Value and Third Country Sales for Foreign Market Value*

Asocolflores also argues that ITA was required to use either constructed value or third country prices where no adequate home market sales existed, but that it could not use both methods for one producer. The court can find absolutely nothing in the statute or legislative history which forbids ITA's practice in this regard. *See generally*, 19 U.S.C. § 1677b(a).[16]

ITA is not required to eliminate third country prices as a possible surrogate for home market price before resorting to constructed value. This statutory flexibility is intended to assist ITA by lessening its administrative burdens. *See* S. Rep. No. 249, 96th Cong., 1st Sess. 95-96 (1979). The statute, however, does not mandate use of only constructed value for a particular producer when ITA is able to use third country prices for certain periods but not for others. The statute favors use of actual prices where appropriate. *Id.*

4. *Exclusion of Certain Flores Del Rio (Del Rio) Sales in Calculating Third Country Price*

Asocolflores asserts that certain Del Rio sales should be omitted from the foreign market value calculation. Presumably this would result in use of constructed value because of inadequate third country sales. *See* 19 U.S.C. § 1677b(a). As indicated, actual prices are preferred if they may be used appropriately. The only reason offered for exclusion of the sales at issue is that they are alleged to be sales for export to the United States as opposed to the third country. The orders, though received from the U.S. distributor, were for direct shipment to Canada. The contractual arrangements are the same for U.S. and Canadian customers. That the reseller remits

[16] Any use of the disjunctive in the legislative history, that is, constructed value *or* third country prices, is unrelated to the concept of "per producer."

payment to Del Rio does not change the result that the merchandise was sold for export to Canada. The sales should not be excluded.

5. *Cost of Production, Treatment of Culls*

a. *Allocation of Production Costs to Culls*

As did the producers, ITA treated certain non-export quality flowers as "culls." Culls were often disposed of as waste, or if saleable, were sold for low prices in the local market. ITA's treatment of non-export quality flowers as a by-product was supported by substantial evidence. The record indicates that cull value was relatively low and that production of culls is unavoidable.[17] These both have been recognized by ITA in the past as indicia of by-product status. *See* discussion in *Ipsco, Inc. v. United States*, 12 CIT ——, 687 F. Supp. 633, 636-7 (1988). Nothing in the record indicates that other factors should have altered the outcome here. Cull value, if determinable, should be deducted from cost of production and production costs should not be allocated to culls. *Id.* ITA's methodology is sustained in this regard.

b. *Uniflor's Cull Credit*

Asocolflores, somewhat contradictorily, alleges that Uniflor's cull value offset to producer costs was too low because ITA only allowed the offset when it could relate cash journal entries to receipts. It is within ITA's discretion not to accept cash journal entries as sufficient verification.[18]

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[17] Plaintiffs do not support their statement that some "second quality" flowers were of a value approaching that of export quality flowers. As far as the court understands ITA's methodology, costs are allocated over all "export quality" flowers; this does not include seconds, splits or culls. ITA maintained consistency by excluding, where possible, any such sales on the U.S. price side of the comparison.

[18] Asocolflores indicates at p. 77 of its brief that the cull offsets which were allowed were allocated improperly. Defendants did not address this. This item should be explained or corrected on remand.

D. *U.S. Price Issues*

1. *U.S. Price Deduction for Customer Credits*

19 U.S.C. § 1677a(d) (1982) requires that United States Price be reduced for expenses incident to bringing the merchandise from the place of shipment to the place of sale in the United States, if such expenses are included in the price in the United States. Credit returns were shown to be a standard U.S. selling practice which were covered in various sales agreements. The credits were treated by the consignees as reducing gross sales value. ITA states that, therefore, it complied with the statute by reducing U.S. price to reflect credit returns. (ITA does not say which producers are affected by this).[19] ITA does indicate that for one respondent, La Pampa, it reduced U.S. price to account for such credits but that it did *not* reduce the number of units sold, for U.S. price purposes, because necessary unit data was missing. *See* 52 Fed. Reg. at 6850 (comment 21). This indicates that ITC likely would have reduced total units sold by the number of units of returned unsalable merchandise if it had such data. It does not appear that La Pampa provided such data. *Id.*

In the case of consignment sales, the effects of sales of flowers which deteriorate after shipment but remain saleable have already been accounted for, at least partially, through ITA's U.S. price averaging techniques. Furthermore, certain U.S. sales of deteriorated merchandise were excluded from the U.S. price calculation. *See* 52 Fed. Reg. at 6852 (comment 40). Any actual returns, i.e., non-sales, should have been documented in order for the number of units to be reduced along with the credit

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[19] Plaintiffs do not adequately support their general argument that no reduction for credit returns should be made at all. *See* 52 Fed. Reg. at 6850 (comment 9).

return deduction. Plaintiffs have not demonstrated error by ITA in this regard.

2. *Non-payment by Uniflor's Customers*

Asocolflores argues that sales that were made with the expectation of prompt payment but for which payment was never received because of the customer's bankruptcy should be excluded in calculating U S. price. ITA treated the sales at issue as sales at invoice value minus a credit expense at a very high interest rate for a period of more than one year.

Defendant did not respond to Asocolflores' argument. Nor is ITA's final determination illuminating on this point. There is no evidence that these sales in any way reflect Uniflor's normal credit practices. Furthermore, ITA's past methodology in this regard is superficially inconsistent. *Compare Neoprene Laminate from Japan*, 52 Fed. Reg. 36,295 (1987) (final antidumping determination finding non-payment sale includable at contract price after adjustment for imputed credit expense) *with Neopreme Laminate from Taiwan*, 52 Fed. Reg. 37,193, 37,194 (1987) (final antidumping determination finding such sales excludable as unrepresentative).

FTC made several arguments, including an analogy to the intetgrity of the sample.[20] It is one thing to include producers in a sample; whether they are typical or atypical is difficult to judge. Once the producer is included, however, all of its sales need not be included in order to maintain sample integrity. ITA must make a determination as to which sales of the included producer are so unrepresentative as to be unfairly distorting. *See Sonco Steel Tube Div. v. United States*, 12 CIT ——,

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[20] FTC's other arguments on this issue are overstated. Specifically, a zero U.S. sales price would not be appropriate.

694 F. Supp. 959, 962 (1988). ITA made many similar choices throughout this investigation. It must make this one as well, and explain it.

E. *Uniflor's Rate as Best Information Otherwise Available*

Plaintiffs allege that Uniflor's rate should not have been utilized as best information available for the non-responding companies because its experience as a small exporter is atypical. Plaintiffs have not demonstrated that Uniflor's experience is atypical of the class of all producers and exporters in any relevant way. ITA's standard practice is to use the highest rate available as best information available in the face of substantial non-compliance. "Best information available" is not necessarily accurate information, it is information which becomes usable because a respondent has failed to provide accurate information. *See Pistachio Group v. United States*, 11 CIT ——, 671 F. Supp. 31 (1987). Uniflor's rate was an acceptable rate to use for "best information otherwise available" purposes. 19 U.S.C. § 1677e(b) (1982).

Conclusion

ITA's overall approach to this investigation is found to be within the bounds circumscribed by the statutory scheme. This matter must be remanded, however, for correction of certain clerical errors noted by the parties. In addition, the court requires further explanation and/or reconsideration of ITA's conclusion as to Flores Esmeralda's interest credit (*supra* at 9-10); material costs for Timana, La Pama and Uniflor (*supra* at 6-8); cull value offsets for Timana, La Pampa (*supra* at 4-6) and Uniflor (*supra* at 25 n.18); and the treatment of Uniflor's U.S. sales for which payment was not received (*supra* at 27-28). ITA is to submit its remand determination within 30 days. Any party wishing to comment

thereon shall do so within 10 days thereof. Responses shall be filed 5 days thereafter.

/s/ Jane A. Restani
JANE A. RESTANI
Judge

Dated: New York, New York
This 6th day of January, 1989

APPENDIX D

[A-301-602]

FINAL DETERMINATION OF SALES AT LESS THAN FAIR VALUE: CERTAIN FRESH CUT FLOWERS FROM COLOMBIA

AGENCY: Import Administration, International Trade Administration, Commerce.

ACTION: Notice.

SUMMARY: We have determined that certain fresh cut flowers from Colombia are being, or are likely to be, sold in the United States at less than fair value, and have notified the U.S. International Trade Commission (ITC) of our determination. We have directed the U.S. Customs Service to continue to suspend the liquidation of all entries of certain fresh cut flowers that are entered, or withdrawn from warehouse, for consumption, on or after the date of publication of this notice, and to require a cash deposit or bond for each entry in an amount equal to the estimated dumping margins as described in the "Continuation of Suspension of Liquidation" section of this notice.

EFFECTIVE DATE: March 5, 1987.

FOR FURTHER INFORMATION CONTACT: John J. Kenkel or John Brinkmann, Office of Investigations, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, DC 20230; telephone (202) 377-3530 or (202) 377-3965.

SUPPLEMENTARY INFORMATION:

Final Determination

We have determined that certain fresh cut flowers from Colombia are being, or are likely to be, sold in the United States at less than fair value, as provided in section 735 (a) of the Tariff Act of 1930, as amended (the Act) (19

U.S.C. 1673d(a)). We made fair value comparisons on sales of the class or kind of merchandise to the United States by the respondents during the period of investigation, June 1, 1985, through May 31, 1986. Comparisons were based on United States price and foreign market value. Foreign market value was based on third country prices and constructed value.

The weighted-average margins for the companies investigated are shown in the "Continuation of Suspension of Liquidation" section of this notice.

Case History

On May 21, 1986, we received a petition in proper form filed by the Floral Trade Council of Davis, California. The petition was filed on behalf of the U.S. industry that grows certain fresh cut flowers. In compliance with the filing requirements of § 353.36 of the Commerce Regulations (19 CFR 353.36), the petition alleged that imports of the subject merchandise from Columbia are being, or are likely to be, sold in the United States at less than fair value within the meaning of section 731 of the Tariff Act of 1930, as amended (the Act), and that these imports materially injure, or threaten material injury to, a U.S. industry.

We determined that the petition contained sufficient grounds upon which to initiate an antidumping duty investigation. We initiated such an investigation on June 10, 1986 (51 FR 21947, June 17, 1986), and notified the ITC of our action. On July 7, 1986, the ITC determined that there is a reasonable indication that imports of certain fresh cut flowers from Colombia materially injure a U.S. industry (USITC Pub. No. 1887).

On July 16, 1986, we presented antidumpting duty questionnaires to a random sample of twelve Colombian flower companies which export the merchandise under investigation: Flores La Pampa, Ltda., Flores Timana,

Ltda., Flores Del Rio, S.A., Flores Generales, Ltda., Royal Carnations, Ltda., Cultivos del Caribe and its related companies (Floramerica, S.A., and Jardines de Colombia), Universal de Flores, Ltda., Inversions Almer, Ltda., Inversiones Paxti, Flores de Cota, Ltda., Productura el Rosal, and Prismaflor. These companies account for ap-approximately 34 percent of exports and were picked to approximate the sales experience of all exporters from Colombia of the subject merchandise to the United States. We requested responses in 30 days.

On July 31, 1986, we received a voluntary response to section A of the questionnaire in acceptable form from Flores Esmeralda, Ltda. On August 1, 1986, the companies which received questionnaires filed their responses to section A of the questionnaire. On August 18, 1986, at the request of respondents, we granted extensions of the due dates for the remaining portions of the questionnaire responses.

On August 11, 1986, we received a letter on behalf of the respondents, challenging the standing of the Floral Trade Council and requesting dismissal of the petition on the ground that the petition was not filed "on behalf of" the U.S. industry, as required by section 732 of the Act (19 U.S.C. 1673a) As we have previously stated. *see e.g., Final Affirmative Countervailing Duty Determination: Certain Fresh Atlantic Groundfish from Canada,* (51 FR 10041, March 24, 1986), neither the Act nor the Commerce Regulations require a petitioner to establish affirmatively that it has the support of a majority of a particular industry. The Department relies on petitioner's representation that it has, in fact, filed on behalf of the domestic industry, until it is affirmatively shown that this is not the case. In this case, we have not received any opposition from the domestic industry.

On September 10, we received the remaining portions of the responses from the companies, including a voluntary response from Flores Esmeralda which was sub-

mitted in proper form. Another company, Agrodex, filed a voluntary response on September 10, 1986. This response was incomplete and, therefore, was not used.

We received supplemental information on October 10, 14, 16, 17, 22, 23, 24, 27, and 28, 1986. At the request of the petitioner, we initiated a cost of production investigation against certain growers of standard carnations.

On October 28, 1986, we made an affirmative preliminary determination (51 FR 39890, November 3, 1986).

Agrodex submitted additional questionnaire responses on October 28 and November 7, 1986, the latter after the October 28 deadline for submitting information to be considered in our final determination.

We found Agrodex's response to be deficient because they did not provide the third country sales and constructed value data requested in the questionnaire.

We conducted verification in Miami, Florida on November 10 through 21, 1986, and in Bogota, Colombia and Colon, Panama from December 1 through 18, 1986.

On November 21, 1986, we received a request from respondents to extend the due date of our final determination to February 16, 1987. On November 24, 1986, pursuant to section 735(a)(2)(A) of the Tariff Act of 1930, as amended, we extended the due date of our final determination until no later than February 17, 1987 (51 FR 43849, December 3, 1966).

On January 30, 1987, respondents requested that the Department extend the final investigation to February 24, 1987. On February 17, 1987, pursuant to section 735(a)(2)(A) of the Tariff Act of 1930, we did so (52 FR 5477, February 24, 1987). Respondents requested another extension on February 20, 1987. We granted that extension and postponed the final determination to February 25, 1987.

As required by the Act, we afforded interested parties an opportunity to submit oral or written comments to address the issues arising in this investigation. A public hearing was held on February 3, 1987.

Scope of Investigation

The products covered by this investigation are fresh cut miniature (spray) carnations, currently provided for in item 192.17 of the *Tariff Schedules of the United States* (TSUS), and standard carnations, gerbera, alstroemeria, standard chrysanthemums, pompon chrysanthemums, and gypsophila currently provided for in item 192.21 of the TSUS.

Fair Value Comparisons

In order to determine whether sales of the subject merchandise to the United States were made at less than fair value, we compared a per stem weighted-average monthly price of U.S. sales with a foreign market value based or third country prices or constructed value.

Section 620(a) of the Trade and Tariff Act of 1984 (19 U.S.C. 1677(f)(1)) expanded the discretionary use of sampling and averaging by the Department to include the determination of United States price or foreign market value, so long as the average is representative of the transactions under investigation. A combination of factors persuaded us to average U.S. sales in this investigation.

In a situation, such as here, where there is a mass filing of petitions alleging the sale of the same product at less than fair value from a number of countries, the limited resources of the Department are severely taxed due to the statutory deadlines. Eight separate cases were filed, some of them covering up to seven types of flowers. At the time of the preliminary determinations, the Department was confronted with over 280,000 sales transac-

tions in the United States of the fresh cut flowers from various countries under investigation. A decision to make fair value comparisons on a transaction-by-transaction basis would place an onerous, perhaps impossible, burden on the Department in terms of data collection, verification, and analysis. Consequently, the Department exercised its broad discretion to average United States price, as authorized by the 1984 amendment to the Act, in order to reduce the administrative burden and maximize efficient use of limited resources, without loss of reasonable fairness in the results.

Another factor in our determination is the need for consistency in our treatment of all the cut flowers investigations. Although the number of transactions varies among the countries being investigated, uniform application of the averaging methodology ensures that all countries are treated on the same basis.

Moreover, because of the perishability of the product under investigation, we believe that averaging the United States prices in this case contributes to a more fair and more representative measure of fair value. Because of this perishability, sellers may be faced with the choice of accepting whatever return they can obtain on certain sales or destroying the merchandise. Unlike non-perishable products, sellers cannot withhold their flowers from the market until they can obtain a higher price.

Faced with investigating sales of a product that is perishable, the Department has three options. The first would be to disregard entirely the "end of the day" or "distress" sales that are taken in lieu of destroying the product. The second would be to perform a transaction-by-transaction comparison. Finally, the third approach would be to employ limited averaging of United States prices.

Under the first approach, the Department would ignore the end of the day sales on the basis that such sales are

not representative of the sellers behavior in the U.S. market. To do so, however, would completely overlook the fact that such sales do occur in the ordinary course of trade in this product. Moreover, any attempt to segregate end of the day sales from dumped sales would be fraught with difficulties. Therefore, we have rejected this approach.

Under the second alternative, the Department would perform a transaction-by-transaction comparison. As noted above, the administrative burden imposed by a transaction-by-transaction comparison in these cases would be overwhelming. Moreover, given the Department's practice of treating non-dumped sales as having zero margins, even where the margins would be negative, this approach would give disproportionate weight to end of the day sales. In other words, a producer whose normal sales are at prices above fair value could be found to be dumping solely because of these end of the day transactions. Again, we note that these sales arise only because of the perishability of the products under investigation.

The final approach, limited averaging of United States prices, represents a balancing of the concerns raised by other approaches. It does not ignore the fact that such end of the day sales occur in the ordinary trade of this product. Nor does it assign disproportionate weight to these sales. Therefore, this comparison yields the most accurate basis for determining whether sales are at less than fair value and constitutes the most representative analysis of trading practices which involve perishable products.

Finally, we note that well before passage of the Trade and Tariff Act of 1984, the Department used its discretion to employ nontraditional methodology when circumstances dictated. In *Certain Fresh Winter Vegetables From Mexico; Antidumping: Final Determination of Sales of Not Less than Fair Value*, 45 FR 20512 (1980),

we used economic sampling techniques involving averaging to determine U.S. price because of the wide fluctuations in price due to the perishability of the product, among other reasons. This decision was affirmed by the Court of International Trade in *Southwest Florida Winter Vegetables Growers Association v. United States*, 7 CIT 99, 584 F.Supp. 10 (1984). The court noted that the Department has "broad flexibility" in administering the antidumping law, which it employed "with reasonable basis in fact reflecting the unique characteristic of perishability in the produce industry." *Id.* at 107-108.

We used the best information available as required by section 776(b) of the Act for three companies, Prismaflor, Productura el Rosal and Inversiones Paxti, because they only submitted responses to section A of our antidumping duty questionnaire and for one other company, Royal Carnations, because its response could not be verified. In cases where companies have failed to respond to our questionnaire, or where responses are deemed too deficient to be employed in our calculations, we have determined that it is appropriate for this final determination to assign such companies the rate for the firm in Colombia with the highest margin of all firms that supplied adequate responses since this rate is higher than the rate provided in the petition, after corrections were made for certain errors. Using this methodology to determine whether sales by these four companies were made at less than fair value, we used the highest margin calculated for a responding firm.

We also used the best information available for the remaining companies for certain pieces of data when the original data could not be verified. Best information available was used, where appropriate, for certain adjustments and charges based on an average amount calculated from data provided by other Colombian growers for a particular adjustment or charge.

United States Price

As provided in section 772(b) of the Act, we used the purchase price of the subject merchandise to represent the United States price, where the merchandise was sold to unrelated purchasers prior to importation into the United States. We calculated purchase price based on f.o.b., packed and unpacked price to unrelated purchasers in the United States. We made deductions, where appropriate, for foreign inland freight and handling expenses.

Where the merchandise was sold to unrelated purchasers after importation into the United States, we used exporter's sales price to represent the United States price, as provided in section 772(c) of the Act. We made deductions, where appropriate, for foreign inland freight, airport cold storage charges, brokerage and handling, air freight, credit expenses, returned merchandise expense, U.S. duty and either selling commissions paid to unrelated U.S. importers or indirect U.S. selling expenses of related consignees. Where appropriate, we added a box charge, less commissions, to the U.S. selling price, to account for additional revenue received by the grower on its U.S. sales.

As noted in the "Fair Value Comparisons" section of this notice, we used monthly weighted-averages for United States price. We chose to use monthly averages because, in many instances, the consignees in the United States reported sales on a monthly basis. For exporters in some countries, the only information available on United States sales is monthly totals. To be consistent, we averaged U.S. price on a monthly basis in all of the Department's cut flower investigations.

Foreign Market Value

For purposes of this investigation, the Department used an extended period of investigation of 12 months from

June 1985 through May 1986, to compensate for the seasonality of flower production and sales.

In calculating foreign market value, based on home market or third country prices, our methodology was to break the period of investigation into two six-month periods, in accordance with our standard practice. For all respondents we found home market sales to be insufficient. Therefore, during each six-month period, if third country sales occurred in three months or more, then the weighted-average prices for the months with sales were used for the months in that entire six-month period without sales. When there were sales in two months or less, constructed values were used.

For Royal Carnations, Flores La Pampa, Floramerica, Jardines de Colombia and Flores del Rio, we initiated a cost of production investigation with respect to sales of standard carnations to sales of that flower in the third country market, since there were no home market sales of such or similar merchandise. For sales by Flores La Pampa, we found sufficient sales at or above cost on which to base foreign market value.

As noted above, Royal Carnations response could not be verified. Therefore, we used the highest margin of a grower that was verified, as the best information available to determine Royal's margin of dumping.

All of Floramerica, Jardines de Colombia and Flores del Rio's sales of standard carnations were made above the cost of production. Therefore, we used sales to third countries as our foreign market value. Two companies, Inversiones Almer and Floramerica, had sufficient third-country sales for gypsophila to compare to U.S. sales.

Where appropriate, we deducted from the third country f.o.b. farm price, foreign inland freight, indirect selling expenses, commissions, credit expenses, miscellaneous export expenses, and returned-flower charges.

In accordance with section 773(e) of the Act, we calculated foreign market values based on constructed value for Flores Esmeralda, Flores Generales, Flores Timana, Cultivos del Caribe, Floramerica (for flowers other than standard carnations and gypsophia) and Jardines de Columbia (for alstromeria) as there were insufficient home market or third country sales of such or similar merchandise for purposes of comparison.

Constructed value, for all flowers sold by these six companies and for those companies whose third country sales were below cost, was based on information submitted by respondents. The per-flower constructed value represents the average cost for each type of flower, based on the costs incurred to produce that type of flower over an annual growing cycle. Since the length of the growing cycle, as well as the nature and timing of the harvest, varies by flower types and seasonality, an annual period was considered to be representative of the growers' costs for the production of the flower. In addition, because of the peak selling periods for flowers, we found that sales volumes varied significantly between the two six-month periods of our investigation. If we had not derived an annual average cost of production figure, we would have been faced with two widely different per-stem constructed values due to a factor which was unrelated to the actual costs of production. To avoid this anomalous result, we have calculated one annual figure.

The per-unit average constructed value or cost of production was based on the quantity of export quality flowers actually sold of each flower by the grower/exporter in all markets. The growers sold the flowers on a consignment basis, absorbing all costs for waste and spoilage which occurred during the production and the marketing of these flowers. By using the quantity of export quality flowers, this waste and spoilage is appropriately accounted for. Part of the waste which occurs during production is comprised of the non-export

quality flowers ("culls") which are produced in conjunction with the growth of the export quality flowers. These "culls" were considered by the Department to be by-products. Therefore, the revenues from the sales of these culls were offset against the costs of the flowers.

For propagation costs, the amortized amount for such expenses was included in the constructed value, if the farm had capitalized and was amortizing such expenses. However, if the farm did not maintain such detailed records, the Department used the current annual amount being expended, where it appeared that such costs would be representative of the actual costs which were initially incurred for the flowers currently being harvested.

When certain expenses were not recorded by the farms, the Department calculated a cost for such items. These items, for some farms, included administrators' salaries, amortization of greenhouses and rental expenses paid to a related company.

For interest expense, a deduction was made to adjust for that portion of such expense attributed to the credit expenses for sales.

Where there were no sales in the home market or to third countries or where selling expenses for these markets were not reported, U.S. selling expenses were included in constructed value. In all cases, general expenses exceeded the statutory minimum of 10 percent of the cost of materials and fabrication; therefore the actual general expenses were not used. The statutory minimum profit of eight percent was included because the Department could not verify home market or third country profit data. Where we compared constructed value to exporter's sales price we deducted sales commissions when the importer was unrelated (or indirect U.S. selling expenses if sales were made through a related U.S. importer), as well as bank charges and credit expenses, as appropriate. For purchase price transactions, we ad-

justed constructed value for credit expenses and deducted packing costs, as appropriate. We added U.S. packing to constructed values. We made a deduction for home market credit expenses, and where appropriate, we used indirect expenses to offset other U.S. selling expenses in accordance with § 353.15(c) of our regulations.

Currency Conversions

For comparisons involving exporter's sales price transactions, when calculating foreign market value, we used the official exchange rate on the date of purchase pursuant to section 615 of the 1984 Act. We followed section 615 rather than § 353.56(a)(2) of our regulations, as it supersedes that section of the regulations. Normally, we use certified daily exchange rates furnished by the Federal Reserve Bank of New York as the official exchange rates, but no certified rates were available for Colombia. Therefore, in place of the official certified rate, we used the monthly exchange rates published by Bank of America, London, as best information available.

Verification

As provided in section 776(a) of the Act, we verified the information provided by respondents used in making our final determination, using standard verification procedures, including examination of relevant information on selected sales.

Petitioner's Comments

Comment 1: Petitioner argues that the Department should not use monthly averages for determination of United States prices for the final determination as it did for the preliminary determination. Further, petitioner argues that the Department should not use three-month, six-month, or annual averages as proposed by the respondents. It argues that the use of such averages for products whose-prices fluctuate on a daily or weekly basis

disguises dumping margins. Petitioner further contends that, if the Department uses averages, the law restricts their use to instances in which the use of averaging does not distort the existence or amount of less than fair value sales and to situations involving large numbers of transactions, where a sale-by-sale analysis would impose an onerous burden on the Department. Petitioner maintains that both the statute and administrative precedent preclude the use of averaging in this case. If the Department uses averages for United States price, however petitioner suggests use of daily averages during the winter and spring months and other months which had significant swings in unit prices.

DOC Position: We disagree. See the "Fair Value Comparison," "United States Price," and "Foreign Market Value" sections of this notice.

Comment 2: Petitioner states that respondents which did not file complete verified responses should be subject to the highest rate found for any individual respondent or the rate calculated in the petition. Petitioner further states that the Department should not average the constructed value for other respondents and use "that figure as a proxy for foreign market values. Petitioner contends that, otherwise, respondents would be encouraged to submit piecemeal responses, especially where the cost of production data would reveal greater less than fair value margins than the average constructed value figures used in the preliminary determination.

DOC Position: We concur in part. Constructed value for those respondents which did not file substantially complete, verified responses is based upon best information available. As best information available in this case, we used data received from the company that submitted a complete, verified response and had the highest margin.

For those companies, however, for which minor amounts of information could not be verified, we believe it would

be a draconian measure to ignore all their data which was verified. Rather than ignore the entire response, therefore, in these instances where the companies were responsive and made good faith efforts at the verification to produce all data, we used all verified data and substituted an average verified number obtained from all companies for the specific category of information which we were unable to verify.

Comments 3: Petitioner objects to the Department's "recalculation" of production cost estimates contained in the petition. Specifically, it objects to the deduction of officers salaries and certain interest expenses from production costs. Concerning officers' salaries, petitioner argues that these salaries represent a component of direct labor cost incurred by all producers whether actually performed by officers, as is common practice in the United States, or by others. As such, if the Department deducts officers salaries from production costs, it must include additional labor to replace the owner or other officers. Concerning interest expense, petitioner states that the interest deducted by the Department represents interest on working capital, which is a component of growing costs, not selling, general and administrative expenses.

DOC Position: We disagree in part. The Department did not include officers salaries and interest expenses incurred for working capital loans in the cost of manufacturing for its calculations of the constructed value in the preliminary determination. The term "officers' salaries" connotes wages paid for managerial services by the farm. Since the verification, however, the Department has noted that certain officers of the farms in Colombia actually perform some farm or administrative work. In such instances an appropriate amount has been added to the cost of manufacturing. Salaries were not imputed for owners in abstentia who did not contribute to day-to-day administration.

With regard to interest expenses, the Department considers interest expense used to finance short-term or long-term assets to be a cost incurred for the general operations of the company. When the product under investigation is a discrete product requiring an extended period of time for its manufacture, such cost may be included in the cost of manufacturing. However, that is not the situation in this case and, therefore, the interest expense was considered to be a part of the general expenses.

Comment 4: Petitioner states that in calculating constructed value on the basis of respondent's data, unit costs should be computed on the basis of flowers sold, not flowers produced, or, alternatively, the Department could allocate production costs to total production, but in that event, to the extent that cost is allocated to all flowers, all flowers must be assigned a price. Those flowers sold for no price by definition would constitute less than fair value sales.

DOC Position: We agree that unit costs should be computed on the basis of flowers sold. Allocating the total constructed value over the volume of export quality flowers sold supports the Department's contention that costs associated with those flowers produced yet not sold due to perishability, transport damage, etc. must be borne by the flowers actually sold. Our computation takes into consideration that a flower grower in the normal course of business would reasonably anticipate losses in this nature as a consequence of the product's perishability and fragility.

Comment 5: Petitioner argues that costs of obtaining plants or cuttings should be included for each planting period. Petitioner further contends that the cost of a sufficient number of plants planted far enough in advance to produce the flowers exported to the United States, must be calculated for each respondent and allocated on a unit basis according to the shipment of export quality flowers.

DOC Position: We disagree. See our reference to petitioner's comment 13.

Comment 6: Petitioner argues that income obtained from currency hedging should not be used to offset production costs.

DOC Position: We agree. The Department includes only the revenues and/or expenses directly related to the production process to offset against the cost of production. Income from currency hedging was not considered to be directly related to the production of the flowers.

Comment 7: Petitioner argues that, to the extent that the Department based foreign market value on constructed value, no adjustment should be made to that value under 19 CFR 353.15. Petitioner further argues that the Department should not adjust constructed value to the extent of indirect selling expenses incurred in the United States, sales commissions, credit costs and royalties. Petitioner contends that none of these deductions from constructed value is permissible under the statute, and each such adjustment will invariably reduce the statutory amount for general expenses.

DOC Position: We disagree. Section 773(a)(4)(B) of the Act provides that when it is established that the amount of any difference between the United States price and the foreign market value is due to differences in circumstances of sale, "due allowance shall be made." Section 773(a) of the Act does not distinguish constructed value from any other method of determining foreign market value. Thus, circumstance-of-sale adjustments are required where constructed value is used as the basis for foreign market value, just as when home market or third country prices are used. *See, Certain Electric Motors from Japan* (49 FR 32627, 32631 (1984); 48 FR 14719, 14721, 1983); *Cellular Mobile Telephones and Subassemblies from Japan* (50 FR 45447, 1985). The Department, pursuant to 19 CFR 353.15, makes reason-

able allowances for bona fide differences in the circumstances of sales to the extent that it is established to the satisfaction of the Secretary that the amount of any price differential is wholly or partly due to such differences. Credit costs, sales commissions and other selling costs are specifically identified as items that may require an adjustment. Indirect selling expenses are included under the heading of "other selling" expenses. Royalties were determined not to be selling expenses. Rather they are a part of the cost of production. The adjustment (allowance) according to the regulations is a reasonable amount based on the cost of such differences to the seller. The constructed value by definition is limited to three types of adjustments, one of which would be for circumstances of sales.

Comment 8: The Petitioner argues that the Customs Service should calculate the estimated Duty deposit rate caluculated for Colombian imports based on the Department's weighted-average U.S. price and not the customs value assigned by the Customs Service to imports of fresh cut flowers. If not, the duty paid will be too low.

DOC Position: The Department cannot know, at the time the merchandise is entered, what the correct United States price is. Moreover, the United States price calculated for the period of investigation is not necessarily close to what we will determine the United States price to be for merchandise entering now and in the future. Therefore, we are continuing our longstanding practice of instructing the Customs Service to collect estimated dumping deposits based on the entered value of the merchandise.

Comment 9: Petitioner argues that Floramerica group's sales data should not be used because of significant discrepancies found at verification.

DOC Position: We disagree. The discrepancies found at verification were minimal. Therefore, we are using Floramerica's sales data.

Comment 10: Petitioner argues that the selling costs of Floramerica's related U.S. consignee, Sunburst Farms, were not verified. Consequently, all selling expenses incurred in the U.S. market should be presumed to be direct expenses.

DOC Position: We disagree. The selling expenses of Sunburst Farms and its affiliates were verified in detail. Accordingly, they have been utilized in the final determination and allocated as indirect selling expenses.

Comment 11: Petitioner argues that advertising costs in the U.S. market should be deducted from exporter's sales price and should not be included in the offset cap.

DOC Position: We agree. We deduct advertising expenses as a direct selling expense when it is made for advertising which is targeted to the customer of the purchaser. In this investigation the advertising by Sunburst Farms is targeted not at its customer but rather at its customer's customer. Thus, we made a deduction from exporter's sales price for advertising as a direct selling expense and have not included it in the offset cap.

Comment 12: The petitioner argues that although Jardines de Colombia reported costs during the period under investigation, it attempted to allocate those costs over sales that had been cut prior to the period for which costs were reported, including flowers in cold storage.

DOC Position: We disagree. During verification, the costs associated with flowers held in cold storage at the end of 1984 were verified. These costs were included in the calculation of constructed value in the final determination. Thus, total costs were allocated over total flower sales during the period of investigation.

Comment 13: Petitioner contends that Floramerica submitted planting costs incurred in one quarter during the investigation period but did not report costs incurred

prior to the period of investigation that should be attributed to flowers cut during the subject period.

DOC Position: Although the respondent did not capitalize certain planting costs incurred prior to the period of investigation which related to flowers sold during the period of investigation, costs incurred during the period of investigation were included in the cost of production. A portion of these costs were incurred for the propagation of flowers that were sold after the period of investigation. We believe that on average, this method results in an accurate unit cost of production.

Comment 14: Petitioner argues that Cultivos del Caribe capitalized construction costs in 1985 but that similar costs in earlier periods were expensed and therefore not included in the costs incurred during the period of investigation. Therefore, depreciation was understated during the period of investigation.

DOC Position: We agree. During verification, 1984 construction expenses were examined. For the calculation of constructed value for the final determination, the depreciation associated with these expenses was included as part of the current costs. Costs prior to 1984 were capitalized by the company. Thus, total depreciation included construction costs prior to 1984, and after 1984 plus the amount added for 1984, which had been expensed.

Comment 15: Petitioner argues that Cultivos del Caribe's annual depreciation expenses did not reconcile with its monthly asset registers and worksheets. Therefore, depreciation expenses and cost of manufacture were understated.

DOC Position: We disagree. We evaluated this discrepancy during verification and found that the differences would not have an effect once costs for construction expensed in 1984 were reconciled.

Comment 16: Petitioner argues that production-related expenses for maintenance of farm equipment by Cultivos del Caribe must be reclassified to cost of growing, rather than general expense.

DOC Position: We agree. Production-related maintenance expenses were included in cost of growing in calculating the constructed values for the final determination.

Comment 17: Petitioner argues that because Floramerica did not separately identify labor costs incurred in packing for export to the United States, the Department should not deduct packing labor costs from constructed value, but simply compare constructed value with packed U.S. prices.

DOC Position: We disagree. Packing costs, as verified, include the cost of material and all other costs incidental to placing the goods in condition for shipment to the United States. This amount included expenses for labor. Packing costs were not included in cost of production for purposes of calculating profit but were included in constructed value as provided for in section 353.6 of the regulations.

Comment 18: Petitioner argues that the sales data submitted by the grower Flores Timana are unreliable and should be rejected.

DOC Position: We disagree. The sales data submitted by Flores Timana have been satisfactorily verified and have therefore been utilized for this final determination.

Comment 19: Petitioner argues that in calculating United States price for Flores Timana, the Department should start with sales prices lower than those shown in Flores Timana's response to the questionnaire.

DOC Position: We disagree. The prices shown in the response to the questionnaire have been verified.

Comment 20: Petitioner argues that the Department should increase the adjustment for credit expense for Flores Timana due to the payment procedures discovered at verification of certain U.S. customers.

DOC Position: During the period of investigation, Flores Timana sold flowers to four importers. For three of these importers, we calculated credit expense based on their verified payment periods. For the fourth importer, for whom it was impossible to calculate an average payment period, we calculated a credit expense adjustment based on the average of the verified payment periods of the other three importers.

Comment 21: Petitioner argues that fair value calculations for Flores Timana for flowers sold through one importer should be based on the best information available because that importer would not reveal the identity of its owners.

DOC Position: We disagree. No evidence has been submitted which indicates there is any common ownership between Flores Timana and this particular importer. At verification, Flores Timana provided complete information regarding its ownership and we saw no relationship to the U.S. importer in question.

Comment 22: Petitioner argues that in calculating United States price for Flores Timana, air freight charges should be calculated on the basis of boxes shipped and allocated over boxes sold, as was done in the original response to the questionnaire.

DOC Position: We agree and have made this calculation in the final determination.

Comment 23: Petitioner argues that free samples shipped by Timana to the United States should not be excluded from the Department's calculations.

DOC Position: We agree. We have included these sales and assigned them a value of zero.

Comment 24: Petitioner argues that Timana's response is insufficient and should not be relied upon. However, in the event the Department relies on Timana's submission, various changes should be made as a result of verification. Petitioner suggests that the Department include (1) the rent and property taxes, not included in the production cost calculations, by using the rent expenses incurred by a nearby grower to Timana or by using land expenses set forth in the petition as the basis for constructed value, (2) the expenses related to the propagation of mother plants, not included in the production calculation, by using the propagation costs incurred by other pompon growers in Colombia, and (3) the repairs and maintenance, utilities, indirect materials, amortization and depreciation expenses in overhead, not in the general expenses, as they were originally reported.

DOC Position: The Department adjusted the costs by including a rent expense, based on best information of other growers, in the company's cost of production data. However, the Department verified Timana's current costs related to propagation. Since the propagation activities are continuous over a period of time, these current costs for propagation were considered to be representative of costs incurred in connection with exports during the period of investigation and were included in respondent's costs. Likewise, expenses such as repairs and maintenance, utilities, and indirect materials were appropriately classified in the response.

Petitioner's Comment 25: Petitioner argues that Timana's response is unreliable because: (1) Material costs for the first five months of 1986 were not verifiable; and (2) cost of production data do not include any figures or accounting for the use of land and buildings owned by a related party.

DOC Position: We disagree. Flores Timana's data for 1985 were verified except for material costs for the first

five months of 1986. Timana provided estimates of material costs for the five months of 1986 due to the company's practice of expensing materials in relation to a year-end inventory count. No physical inventory count was performed subsequent to the fiscal year-end of December 31, 1985 and thus the respondent could only provide estimates of the material costs for this period. For our calculation of material costs, however, rather than using estimated figures, we used the verified material costs for fiscal year 1985. We felt that production in the first five months of 1985 did not materially differ from that for the first five months of 1986. Also, in this manner we were able to include certain loses which are calculated only at year-end as well as use of verified figure for this portion of the cost of production. With regard to costs associated with the use of land and buildings, owned by a related party, the Department imputed a cost to Timana.

Comment 26: Petitioner argues that, with respect to Flores La Pampa, the Department should reject sales data pertaining to two United States customers because the data were not submitted until the verification.

DOC Position: We disagree. The data in question were first submitted in a submission dated October 10, 1986, well before the verification and were verified.

Comment 27: Petitioner argues that with respect to the grower Flores Del Rio, the Department should make a deduction for credit expenses based on the terms of the contract between Flores Del Rio and the importer.

DOC Position: We agree. Since we could not verify the amended time frame for payment, we have used the time specified in the contract as the best information available.

Comment 28: Petitioner argues that the cost of production information submitted by Royal Carnations was

unreliable and untimely and must be rejected as a basis for a final determination.

DOC Position: We agree. At verification, the Department was able to verify only direct labor costs because of the condition of the cost accounting records or other accounting practices. The other major components of the cost of production were unreliable and, consequently, could not be verified. Therefore, we are not using any of the data in the response. Instead, we are using the best information available.

Comment 29: The petitioner argues that material, labor, and overhead allocations between alstromeria and other flowers of Flores de Cota should only be recalculated on the basis of area in production.

DOC Position: We agree. All costs were reallocated based on relative area under cultivation.

Comment 30: The petitioner contends that offsets to Flores de Cota's production cost on account of home market sales should be reduced by the amount of included revenue from home market sales of export quality flowers.

DOC Position: We agree. Revenue offsets to production costs were reduced by the amount of revenues from home market sales of export quality flowers. Total adjusted costs were then allocated over total unit sales.

Comment 31: The petitioner argues that the Department should not allow costs associated with new land for roses to be excluded from Flores de Cota's constructed value without strong evidence.

DOC Position: During verification it was determined that these costs were associated with land devoted solely to the production of roses. Therefore, we have not included these costs as being attributable to the production of the flowers under investigation.

Comment 32: Petitioner argues that since Flores de Cota did not have any short-term loans during the period of investigation, the Department should use the highest short-term rate of the companies verified and not assume an average rate.

DOC Position: We disagree. We believe that the most appropriate surrogate for a short-term interest rate, absent actual company experience, is to use the average short-term credit cost of the verified growers.

Comment 33: Flores Generales' vehicle maintenance, electricity and medical expenses should be included in overhead or direct labor rather than general expense.

DOC Position: We agree. These expenses were classified as overhead or direct labor.

Comment 34: The petitioner argues that the Department should impute salaries for the two partners of Flores Generales' who performed administrative tasks without pay.

DOC Position: We agree. Salaries were imputed based on the best information available and included in overhead or general expenses depending on whether the individual spent the majority of his time as a farm manager or an administrator.

Comment 35: The petitioner urges the Department to use the best information available on Flores Generales' rent rather than the submitted rent which was paid to a related party.

DOC Position: We disagree. We evaluated the rent paid and compared it to rent of other farms. Under the circumstances, it appeared to reflect market conditions.

Comment 36: The petitioner contends that the cost data submitted by Universal De Flores (Uniflor) were estimates which were not broken down into separate cost elements such as labor or overhead and, therefore, should be rejected by the Department.

DOC Position: We disagree. During the verification Uniflor provided actual monthly costs which could be classified into appropriate cost elements.

Comment 37: The petitioner states that due to the lack of records, the Department could not determine whether Uniflor's home market sales resulted in profits or losses. Therefore, the Department should not allow a revenue offset to the cost of production for any home market sale.

DOC Position: We disagree. In accordance with our normal policy, revenue from home market sales of culls, which we consider to be by-products, was deducted from the cost of production.

Comment 38: The petitioner states that Uniflor's partner is not paid a salary and argues that the cost is not included in administrative expense.

DOC Position: We agree. When no salaries were paid to administrators, salary expenses were imputed based on comparable expenses at other Colombian farms for the manager's contribution to farm management and administration.

Comment 39: The petitioner argues that the Department should not permit Flores Generales to amortize the cost of wire supports over 42 months rather than over the life of the plant, 18 months.

DOC Position: We agree. Wire supports costs were allocated over 18 months.

Comment 40: Petitioner urges that various maintenance expenses reported by Flores Esmeralda in freight costs should be included in cost of manufacturing.

DOC Position: We agree. Repair and maintenance expenses associated with farm machinery were reclassified and included in cost of manufacturing as these costs are related to production of the product.

Comment 41: Petitioner argues that Flores Esmeralda's interest income on certificates of deposit are unrelated to interest expenses incurred with respect to obtaining working capital to finance company operations and as such should not be deducted from interest expense.

DOC Position: Interest expense was reduced by the short-term portion of interest revenue as this revenue reflects investment of current operating cash flow from company operations.

Comment 42: Petitioner argues that the Floramerica group's submitted depreciation expense includes depreciation only on construction costs at Cultivos del Caribe for 1985 as these costs were expensed in prior years, thus understating actual depreciation.

DOC Position: We agree. During verification, historical construction costs were analyzed and depreciation was calculated for those assets expensed in 1984. Construction expenses prior to 1984 were capitalized by the company and included in submitted depreciation. Total depreciation was increased to reflect the 1985 year where construction costs were expensed. This amount was included in cost of manufacture.

Comment 43: Petitioner argues that sales of Floramerica's flowers in the period of investigation should be reduced by the amount of flowers held in cold storage prior to the period of investigation which were sold during the period because total costs for the period apply only to flowers produced during the period.

DOC Position: We agree. Calculation of the unit cost of the flowers would be inaccurate if the total cost of production did not include costs for all flowers sold. Thus, costs for flowers held over in cold storage and sold during the period of investigation were included in the total cost of production when calculating the unit cost.

Respondents' Comments

Comment 1: Respondents believe that, given the unique nature of the U.S. market for fresh cut flowers, U.S. prices should be averaged over an annual, semi-annual or, at least, quarterly period.

DOC Position: He disagree. See the "Fair Value Comparisons," "United States Price", and "Foreign Market Value" section of this notice.

Comment 2: The respondents argue that the random sample is not representative of the Colombian flower industry for the following reasons: (a) It includes a disproportionate number of small growers; (b) it does not cover the required percentage of total exports; and (c) it was not selected in a rational manner.

DOC Position: We disagree. Our sample was selected in conformity with standard statistical sampling techniques, and, therefore, is valid. For this investigation, because we had no data on which to construct a stratified or other more complex sample, we chose to use a random sample. We randomly chose from a universe consisting of all the companies which export cut flowers to the United States, twelve companies to receive questionnaire. It is our belief that the validity and appropriateness of this sampling technique has been borne out by the results. In fact, if we had been able to segregate companies by the type of flower produced and amount of sales at the beginning of this investigation when we were deciding whom to investigate, we would have wanted to investigate producers of all sizes producing all the different flowers under investigation. Looking at the results of our sample, we find that all seven types of flowers have been included because they were produced by at least one firm in our sample. In addition, we have investigated one of the three largest Colombian producers of cut flowers and several smaller producers. We believe it is reasonable that, since there are many more small-sized flower producers, our sample should consist of

more small-sized than large-sized flower companies. Far from biasing our sample, we believe this strengthens its validity. In any case, since we have calculated a weighted-average rate for all other firms, the company with the larger volume of imports will account for a greater proportion of the all other margin.

In conclusion, we believe that our sample is proper from a statistical point of view, that its validity has been borne out by the results, and that it is in conformity with our authority under section 620 of the Trade and Tariff Act of 1984, and § 353.23 of the Commerce regulations.

Comment 3: Royal Carnations should be excluded from the sample because (a) it should have been in bankruptcy during the period of investigation; (b) its right to export was revoked before the period of investigation; and (c) its condition is atypical and not representative of the industry.

DOC Position: We disagree. Royal Carnations should not be excluded because it was a fully operational company during the period of investigation and continued to export flowers to the U.S. throughout the period. In addition, there is no information on the record to prove that Royal's situation is not representative of a certain portion of the industry.

Comment 4: Respondents argue that Commerce should not use third country sales for foreign market value. Rather, we should use constructed value because the terms of sale to third countries (FOB) are different than the terms for U.S. sales (CIF and consignment) leading to unfair distortions between two markets. The fixed price sales to third countries are characterized by predictability and stability in prices whereas the consignment market in the U.S. reflects price volatility.

DOC Position: We disagree. The Department, in conformity with the regulations, generally has a preference

for using third country data, when available, rather than constructed value. In this investigation, we found both consignment and fixed price sales in both the United States and third countries. Thus, although we recognize that one market had predominantly fixed prices while the other one consisted primarily of consignment sales, we do not believe the markets are so different as to be incapable of comparison. In addition, the fact that we have used monthly averages for prices would tend to smooth out any anomalous individual sales. Thus, we have continued to use third country sales when possible in this investigation, although we recognize that for a number of companies we were unable to use such sales and instead used constructed value for foreign market value.

Comment 5: Respondents state that in calculating constructed value on the basis of respondents data, unit costs should be computed on the basis of flowers produced, not flowers sold.

DOC Position: We disagree. See "Foreign Market Value" section of this notice and our response to petitioner's comment 4.

Comment 6: Respondent argues that constructed value should be calculated on an annual basis to accurately reflect production costs. Respondent further contends that the use of a six-month constructed value, as used in the preliminary determination, distorts the actual per unit cost of production as a consequence of the seasonality of production levels and the relative uniformity of production costs from one calendar quarter to another.

DOC Position: We agree. We have used an annual constructed value figure. See "Foreign Market Value" section of this notice.

Comment 7: Respondent states that start-up costs should be normalized. Respondent further contends that the calculation of normalized costs requires that the sub-

stantial initial investment be amortized over an appropriate time period and not be attributed to the narrow time frame during which such costs were incurred and that anticipated normal production volume be considered.

DOC Position: We agree in part. Start-up costs for flower growers are, substantially, land preparation expenditures such as agronomic analysis, special material application, if necessary, and the costs related to propagation and the greenhouse construction. The land preparation expenditures are considered part of the land's value, and therefore are not included in the costs. Those costs related to propagation and greenhouse construction, however, are capitalized and amortized and therefore included in the cost during the period of investigation.

Comment 8: Respondent argues that the cost of packing should not be included in the base for calculating the statutory eight percent profit for constructed value comparisons.

DOC Position: We agree. The Department used the methodology prescribed by section 773(e) of the Act for constructed value.

Comment 9: Respondent argues that no deduction from United States price should be made for return credit for bad quality or for returned flowers.

DOC Position: We disagree. Return credits appear on the grower's report in the calculation of net return to the grower as a deduction from the consignee's gross sales amount. Therefore, we made the appropriate deduction.

Comment 10: Respondents argue that if Colombian inland freight is deducted from United States price, then an adjustment should be made to the constructed value side since this cost is included in the cost of production data submitted by the respondents.

DOC Position: We agree and have adjusted both foreign market value and United States price for Colombian inland freight.

Comment 11: Respondents argue that no United States price adjustment should be made for royalty payments since United States importers or their customers do not make any royalty payments and these expenses have been included in the growers' cost of production.

DOC Position: We agree. This cost is included in the cost of production. It is not a selling expense.

Comment 12: Respondents argue that no United States price adjustment should be made for airport cold storage facilities for products shipped from Bogota.

DOC Position: We agree. We verified that respondents incur these costs only for shipments from Medellin.

Comment 13: Respondents argue that no United States price adjustment should be made for imputed credit expense. However, if such an expense is deducted, then an equal amount should be deducted from the growers general, selling and administrative expenses so that it is not double-counted when constructed value is used as the basis for foreign market value.

DOC Position: We deducted imputed credit expense from both the United States price and foreign market value.

Comment 14: Respondent argues that since sales of Flores Del Rio to Canada are made by the same importer, and under terms of the same contract, as are sales to the United States, such Canadian sales should be considered sales to the United States. *Therefore*, respondent argues that these Canadian sales are not an appropriate basis for determining foreign market value.

DOC Position: We disagree. The verification revealed that for most of these Canadian sales, Flores Del Rio

prepared invoices which indicated that the purchaser was a Canadian customer. It is therefore clear that Flores Del Rio was aware at the time of exportation that the ultimate destination of the flowers was Canada. We therefore find it appropriate to utilize these sales to Canada as the basis for foreign market value.

Comment 15: Respondent argues that, in calculating United States price for Flores Del Rio, the Department should deduct the amount of air freight charges paid by the importer, rather than the amount calculated and deducted from the gross sales price by the importer, in determining the net amount due the grower.

DOC Position: We disagree. It is our intent to calculate United States price based on the grower's net return, regardless of any inaccuracies in the importer's calculations. In this instance, there is no evidence that any rectification was made to the amount due the grower.

Comment 16: Respondent argues that in calculating United States price for Flores Del Rio, no deduction should be made for United States brokerage and handling, royalties, or cold storage charges at Bogota airport.

DOC Position: We agree. As a result of the verifications at Miami, Florida and Bogota, Colombia, we determined that such charges were not applicable to Flores Del Rio's sales.

Comment 17: Respondent argues that "splits" (carnations with split calyxes) should be excluded in calculating United States price for Flores Del Rio.

DOC Position: "Splits" are carnations with inherent defects—split calyxes. "Splits" are generally considered to be second quality flowers, and are not usually exported to the United States. Our investigation is focused on "export" quality flowers. Therefore, for purposes of this investigation, we are excluding Del Rio's sales of splits in calculating U.S. price.

Comment 18: Respondent argues that with respect to the grower Flores La Pampa, the Department should disregard below-cost third country sales only when the volume of below-cost sales exceeds 50 percent of the total sales volume for the entire period of investigation.

DOC Position: We agree. This is consistent with our policy concerning investigations of perishable commodities. *See Southwest Florida Winter Vegetables Growers Association* v. *United States*, 7 CIT 99, 584 F. Supp. 10, 1984.

Comment 19: Respondent argues that with respect to Flores La Pampa, an adjustment should be made for bad debt expense incurred on its third-country sales.

DOC Response: We disagree. We consider bad debt, by its very nature, to be an indirect selling expense since, under generally accepted accounting principles, bad debt is recovered over time by future price increases. However, in this instance we have no evidence that the company has written off this debt in its books. Therefore, no adjustment has been made.

Comment 20: Respondent argues that in calculating United States price for Flores La Pampa, the deduction for credit returns should be based on the average for the period of investigation rather than the actual credit return for each month.

DOC Position: We disagree. For this investigation we have decided to calculate United States price on a monthly, not yearly average basis. We, therefore, find it appropriate to deduct the actual amount of credit returns for each month.

Comment 21: Respondent argues that, in calculating United States price for carnations from Flores La Pampa sold by one importer, if the Department makes a deduction for the dollar value of credit returns, it should also

reduce the quantity of units sold to calculate Flores La Pampa's per unit revenue.

DOC Position: We disagree. The evidence contained in grower's reports submitted by that importer indicates that in many cases the credit granted was for only a portion of the selling price of the flowers. We are unable to determine the number of units which were returned. Also, see our response to respondent's Comment 9.

Count 22: Respondent argues that with respect to Flores La Pampa, foreign market value should be adjusted for credit returns, commissions and insurance paid by Flores La Pampa.

DOC Position: With resspect to credit returns, see our response to respondents' Comment 9 and 22. With respect to commissions and insurance, amounts paid for these items were verified and we did make an adjustment for them in calculating foreign market value.

Comment 23: Respondent argues that Flores La Pampa's constructed value for the preliminary determination was overstated by the inclusion in La Pampa's cost of production data of certain expenses incurred by La Pampa on behalf of an unrelated grower and by not utilizing the correct figure for the volume of flowers exported by La Pampa in calculating the per unit constructed value.

DOC Position: We used the submission of the respondent for the preliminary determination. However, at verification, the Department became aware of certain expenses claimed by the respondent to be related to sales on behalf of the unrelated grower. These costs had been included in the production data submitted by Flores La Pampa in its original response. The Department reduced Flores La Pampa's cost of production by the amount of such expenses related to the other grower. We used the verified sales amount for the final determination.

Comment 24: Respondent argues that with respect to Flores La Pampa's sales to the United States, the sales of La Pampa's flowers by importers Freeman and Peerless should be included in calculating the unit cost of production.

DOC Response: We agree. Although these importers did not submit monthly "grower's reports", Flores La Pampa's sales to them were verified.

Comment 25: Respondent argues that constructed value should not include costs not actually incurred by Timana. Respondent contends that since no payment for rent for its administrative offices was made, it is not appropriate to impute a cost for the use of this space by Timana.

DOC Position: We disagree. When such costs are omitted as a consequence of transactions between related parties, then in accordance with section 773(e) of the Act, imputing the costs is necessary to account for the normal cost experiences which would be incurred absent the relationship. The owner of Flores Timana is related to the owner of Timana's administrative offices. Therefore, since this transaction was between related parties, rent-free office space would not represent a fair value for such a transaction. Rent was included based on other respondents' data.

Comment 26: Respondent argues that the Department should accept and utilize the voluntary response to the the Agrodex group.

DOC Position: We disagree. At the onset of the investigation, the respondent was advised that the Department would not utilize voluntary submissions containing major omissions. The Agrodex voluntary submission did not contain third country sales data for carnations as requested by the questionnaire. Since carnations accounted for well over half of this company's flower sales to the United States, this was considered a major omission. Accordingly, the Department did not utilize the Agrodex submission.

Comment 27: The respondent argues that the three companies in the sample which did not respond should be excluded. Prismaflor apparently does not exist. All attempts to find it have been futile. The other two companies should be excluded because one (Rosal) made a one-time-only sale and the other (Paxti) no longer exports pompons to the United States.

DOC Position: We disagree. In order to maintain the integrity of our random sample, we have included these three companies and used the best information available to determine whether they made sales at less than fair value. In addition, we have no information indicating that these companies experience is not representative of the overall Colombian experience in the production and export of fresh cut flowers.

Comment 28: Floramerica argues that selling expenses deducted from exporter's sales price must be offset by an allowance for indirect selling expenses incurred with respect to third country sales.

DOC Position: We agree. We have taken a deduction in accordance with section 772(e) of the Act.

Comment 29: Floramerica argues that sales by Caribbean Flowers should be excluded from the analysis of Floramerica's sales.

DOC Position: We agree. Floramerica is merely acting as a freight forwarder for the independent growers. In addition, the unrelated growers knew that the flowers were destined for the United States. Therefore, the appropriate respondents should be these unrelated growers. Since these growers are not part of our sample, we have excluded these flowers.

Comment 30: Respondent argues that Floramerica group's constructed value for alstroemeria should reflect an amorization of propagation costs.

DOC Position: We agree. During verification, propagation costs for alstroemeria were examined. In calculating constructed value for the final determination, these costs were amortized over the life of the plant.

Comment 31: The respondent argues that the reporting of all maintenance costs under the selling, general and administrative expense classification does not change the constructed value for Floramerica.

DOC Position: We reclassified the costs to their appropriate expense categories.

Comment 32: The respondent contends that the materials and labor component of fabrication costs for Floramerica must be reduced by the materials and labor attributable to packing so that the calculations for general expense and profit are not flawed.

DOC Position: We agree. As verified, packing expenses include the material and all expenses incidental to placing the merchandise in condition for shipment to the United States.

Comment 33: Respondents argue that, for Flores de Cota, the Department should offset the short-term interest rate by the amount of annual depreciation during the period of investigation of the Colombian peso.

DOC Position: We disagree. We do not make adjustments for gains or losses resulting from foreign currency hedging operations which are considered to be unrelated to the direct production of flowers.

Comment 34: Respondents maintain that the Department should base the United States price for Flores de Cota on the dollar returns to Flores de Cota as verified in Colombia rather than on the verified dollar returns of the consignee.

DOC Position: We agree. Since Flores de Cota is the exporter, it is his actual return that we need to examine to determine whether he is selling at less than fair value.

Comment 35: Flores de Cota's constructed value should reflect a realistic allocation of costs between alstroemeria and rose production.

DOC Position: We agree. All costs were allocated based on relative area under cultivation, which we believe is appropriate.

Comment 36: The respondent contends that Flores de Cota's per unit constructed value is overstated by the inclusion of costs pertaining solely to rose production.

DOC Position: We disagree. Costs associated with land determined during verification to be devoted solely to the production of roses were not allocated to alstroemeria.

Comment 37: The respondent suggests that Flores de Cota's per-unit constructed value is overstated because the domestic revenue used to reduce the cost of production is understated in the company's submission.

DOC Position: We disagree. The Department has subtracted from the cost of production the verified revenues of "culls" made by the company, which was larger than the amount in the original submission.

Comment 38: Respondents argue that the Department should use all U.S. sales as verified for Flores Generales despite the fact that two consignees never submitted responses.

DOC Position: We agree. The sales made through the consignees who failed to respond were verified in Colombia to our satisfaction.

Comment 39: The Department should offset Flores Generales' and Uniflor's cost of production by the full amount of the respondents domestic revenues even where these revenues were not documented.

DOC Position: We disagree. Cost offsets for sale of non-export quality flowers in the home market by Flores Generales and Uniflor were based on verified informa-

tion. This information included sales receipts for these flowers sold in the home market.

Comment 40: Respondents argue that the Department should exclude from all respondents' U.S. sales those sales made by importers to street vendors.

DOC Position: We agree. Most importers destroyed flowers which were no longer capable of being sold to their regular customers. These flowers were not included in our calculations. Some importers, rather than destroying those same types of flowers, sold them to street vendors. Therefore, for purposes of this investigation, where we had information we have excluded these sales from our calculation of U.S. price, since such flowers were not of "export quality."

Comment 41: Respondents argue that Almer's third-country sales are not an appropriate basis for calculating foreign market value.

DOC Position: We disagree. While Almer's third-country sales were insufficient to serve as the basis of foreign market value during the first six months of the period of investigation, its third-country sales during the second six months of the period of investigation are sufficient. We therefore based foreign market value for the first six months on constructed value and used third-country sales in the second six months.

Comment 42: Respondents argue that Uniflor should be excluded from the sample because it is atypical of other growers/exporters in that it purchases rather than grows the flowers it sells and because its flowers are not premium export quality.

DOC Position: We disagree. The fact that Uniflor does not grow the flowers it exports does not warrant eliminating it from consideration. We were not able to verify that the flowers were of inferior quality. Furthermore, to remove Uniflor would bias the statistical sample we are using in this investigation.

Comment 43: The Department should use Uniflor's verified costs in calculating constructed value.

DOC Position: We agree. Constructed value was based on the respondent's actual costs as adjusted.

Comment 44: Respondents argue that Uniflor's sales through one of its consignees should be excluded from U.S. sales.

DOC Position: We disagree. Despite one consignee's failure to pay Uniflor for its flowers, the sales through that consignee are, nevertheless, still subject to investigation.

Continuation of Suspension of Liquidation

In accordance with section 733(d) of the Act, we are directing the U.S. Customs Service to continue to suspend liquidation of all entries of certain fresh cut flowers from Colombia that are entered, or withdrawn from warehouse, for consumption, on or after the date of publication of this notice in the Federal Register. The U.S. Customs Service shall require a cash deposit or the posting of a bond on all entries equal to the estimated weighted-average amount by which the foreign market value of the merchandise subject to this investigation exceeds the United States price as shown in the table below. The margins are as follows:

manufacturer/seller/exporter	Weighted-average margin percentage, final
Flores Esmeralda, Ltda	0
Flores Timana, Ltda	0
Flores de Cota, Ltda	0
Cultivos del Caribe	0.52
Florameria, S.A.	.52
Jardines de Colombia	.52
Flores Del Rio, S.A.	3.26

manufacturer/seller/exporter	Weighted-average margin percentage, final
Inversiones Almer, Ltda	9.06
Flores Generales, Ltda	9.12
Flores La Pampa, Ltda	33.89
Universal de Flores, Ltda	83.97
Royal Carnations, Ltda	83.97
Inversiones Paxti	83.97
Productura el Rosal	83.97
Primaflora	83.97
All Others	3.53

ITC Notification

In accordance with section 735(d) of the Act, we have notified the ITC of our determination. In addition, we are making available to the ITC all nonprivileged and nonproprietary information relating to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms in writing that it will not disclose such information either publicly or under an administrative protective order without the written consent of the Deputy Assistant Secretary for Import Administration. The ITC will determine whether these imports materially injure, or threaten material injury to, a U.S. industry within 45 days of the publication of this notice. If the ITC determines that material injury or threat of material injury does not exist, this proceeding will be terminated and all securities posted as a result of the suspension of liquidation will be refunded or cancelled. However, if the ITC determines that such injury does exist, we will issue an antidumping duty order directing Customs officers to assess an antidumping duty on fresh cut flowers from Colombia entered, or withdrawn from warehouse, for consumption on or after the suspension

of liquidation, equal to the amount by which the foreign market value exceeds the United States price.

This determination is being published pursuant to section 735(d) of the Act (19 U.S.C. 1673d(d)).

Paul Freedenberg,
Assistant Secretary for Trade Administration.

February 25, 1987.

[FR Doc. 87-4465 Filed 3-4-87; 8:45 am]

APPENDIX E

19 U.S.C. § 1677a. United States price

(a) United States price.—For purposes of this subtitle, the term "United States price" means the purchase price, or the exporter's sales price, of the merchandise, whichever is appropriate.

* * * *

(e) Additional adjustments to exporter's sales price.—For purposes of this section, the exporter's sales price shall also be adjusted by being reduced by the amount, if any, of—

* * * *

(2) expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise, and

* * * *

June 17, 1930, c. 497, Title VII, § 772, as added July 26, 1979, Pub.L. 96-39, Title I, § 101, 93 Stat. 181.

19 U.S.C. § 1677b. Foreign market value

(a) Determination; fictitious market, sales agencies

For purposes of this subtitle—

(1) In general.—The foreign market value of imported merchandise shall be the price at the time such merchandise is first sold within the United States by the person for whom (or for whose account) the merchandise is imported to any other person who is not described in subsection (e)(3) of this section with respect to such person—

(A) at which such or similar merchandise is sold, or, in the absence of sales, offered for sale in the principal markets of the country from which exported, in the usual commercial quantities and in the ordinary course of trade for home consumption, or

(B) if not so sold or offered for sale for home consumption, or if the administering authority determines that the quantity sold for home consumption is so small in relation to the quantity sold for exportation to countries other than the United States as to form an inadequate basis for comparison, then the price at which so sold or offered for sale for exportation to countries other than the United States,

increased by, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States, except that in the case of merchandise purchased or agreed to be purchased by the person by whom or for whose account the merchandise is imported, prior to the time of importation, the foreign market value shall be ascertained as of the date of such purchase or agreement to purchase. In the ascertainment of foreign market value for the purposes of this subtitle no pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account.

(2) Use of constructed value.—If the administering authority determines that the foreign market value of imported merchandise cannot be determined under paragraph (1)(A), then, notwithstanding paragraph (1)(B), the foreign market value of the merchandise may be the constructed value of that merchandise, as determined under subsection (e) of this section.

(3) Indirect sales and offers for sale.—If such or similar merchandise is sold or, in the absence of sales, offered for sale through a sales agency or other organization related to the seller in any of the re-

spects described in section 1677(13) of this title, the prices at which such or similar merchandise is sold or, in the absence of sales, offered for sale by such sales agency or other organization may be used in determining the foreign market value.

(4) Other adjustments.—In determining foreign market value, if it is established to the satisfaction of the administering authority that the amount of any difference between the United States price and the foreign market value (or that the fact that the United States price is the same as the foreign market value) is wholly or partly due to—

> (A) the fact that the commercial quantities, in which such or similar merchandise is sold or, in the absence of sales, offered for sale, for exportation to, or in the principal markets of, the United States, as appropriate, in the ordinary course of trade, are less or are greater than the commercial quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale, in the principal markets of the country of exportation in the ordinary couse of trade for home consumption (or, if not so sold for home consumption, then for exportation to countries other than the United States);
>
> (B) other differences in circumstances of sale; or
>
> (C) the fact that merchandise described in paragraph (B) or (C) of section 1677(16) of this title is used in determining foreign market value,

then due allowance shall be made therefor.

(5) Fictitious markets

The occurrence of different movements in the prices at which different forms of any merchandise

subject to an antidumping duty order issued under this subtitle are sold (or, in the absence of sales, offered for sale) after the issuance of such order in the principal markets of the foreign country from which the merchandise is exported may be considered by the administering authority as evidence of the establishment of a fictitious market for the merchandise if the movement in such prices appears to reduce the amount by which the foreign market value of the merchandise exceeds the United States price of the merchandise.

* * * *

APPENDIX F

28 U.S.C. § 1581. Civil actions against the United States and agencies and officers thereof

(a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

(b) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516 of the Tariff Act of 1930.

(c) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930.

* * * *

19 U.S.C. § 1516a. Judicial review in countervailing duty and antidumping duty proceedings

* * * *

(2) Review of determinations on record

(A) In general

Within thirty days after—

(i) the date of publication in the Federal Register of—

(I) notice of any determination described in clause (ii), (iii), (iv), or (v) of subparagraph (B), or

(II) an antidumping or countervailing duty order based upon any determination described in clause (i) of subparagraph (B), or

(ii) the date of mailing of a determination described in clause (vi) of subparagraph (B),

an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing a summons, and within thirty days thereafter a complaint, each with the content and in the form, manner, and style prescribed by the rules of that court, contesting any factual findings or legal conclusions upon which the determination is based.

(B) Reviewable determinations

The determinations which may be contested under subparagraph (A) are as follows:

(i) Final affirmative determinations by the administering authority and by the Commission under section 1671d or 1673d of this title, including any negative part of such a determination (other than a part referred to in clause (ii)).

(ii) A final negative determination by the administering authority or the Commission under section 1671d or 1673d of this title, including, at the option of the appellant, any part of a final affirmative determination which specifically excludes any company or product.

(iii) A final determination, other than a determination reviewable under paragraph (1), by the administering authority or the Commission under section 1675 of this title.

* * * *

APPENDIX G

19 C.F.R. § 353.13. Determination of foreign market value.

In determining foreign market value, the criteria in §§ 353.14 through 353.23 shall apply. The person who alleges entitlement to any adjustment pursuant to §§ 353.14 through 353.19 must establish entitlement thereto to the satisfaction of the Secretary.

19 C.F.R. § 353.15 Differences in circumstances of sale.

(a) *In general.* In comparing the United States price with the sales, or other criteria applicable, on which a determination of foreign market value is to be based, reasonable allowances will be made for bona fide differences in the circumstances of the sales compared to the extent that it is established to the satisfaction of the Secretary that the amount of any price differential is wholly or partly due to such differences. Differences in circumstances of sales for which such allowances will be made are limited, in general, to those circumstances which bear a direct relationship to the sales which are under consideration.

(b) *Examples.* Examples of differences in circumstances of sale for which reasonable allowances generally will be made are those involving differences in credit terms, guarantees, warranties, technical assistance, servicing, and assumption by a seller of a purchaser's advertising or other selling costs. Reasonable allowances also generally will be made for differences in commissions. Allowances generally will not be made for differences in advertising and other selling costs of a seller, unless such costs are attributable to a later sale of the merchandise by a purchaser.

(c) *Special rule.* Notwithstanding the criteria for adjustments for differences in circumstances of sale set for in paragraphs (a) and (b) of this section, reasonable

allowances for other selling expenses generally will be made in cases where a reasonable allowance is made for commissions in one of the markets under consideration and no commission is paid in the other market under consideration, the amount of such allowance being limited to the actual other selling expenses incurred in the one market, or the total amount of the commission allowed in such other market, whichever is less. In making comparisons using exporter's sales price, reasonable allowance will be made for all actual selling expenses incurred in the home market up to the amount of the selling expenses incurred in the United States market.

(d) *Determination of allowances.* In determining the amount of the reasonable allowances for any differences in circumstances of sale, the Secretary will be guided primarily by the cost of such differences to the seller, but, where appropriate, he may also consider the effect of such differences upon the market value of the merchandise.